No. 01-1209

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

-v.-

RICKY W. BRANTLEY,

Defendant/Appellant.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Tenth Circuit Court of Appeals erred in its finding affirming the District Court of the Eastern District of Oklahoma's finding that a sufficient nexus existed between the place to be searched and the items for which the government was searching?

2. Whether or not the courts erred in failing to find that the omission of material facts in the affidavit for search warrant for the search of defendant/appellant's residence were sufficient to vitiate probable cause?

3. Whether or not the Tenth Circuit Court of Appeals erred in its finding affirming the District Court of the Eastern District of Oklahoma's finding that the affidavit for search warrant of the defendant/appellant's residence supported a finding that probable cause existed to issue a warrant for the search.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY THE COURTS

1. Order of the United States District Court of the Eastern District of Oklahoma denying Defendant/Appellant Ricky Brantley's Motion to Suppress Search Warrant, December 1, 2000.

2. United States Court of Appeals for the Tenth Circuit's order affirming the finding of the trial court in its denial of the Defendant/Appellant Ricky Brantley's Motion to Suppress Search Warrant dated May 7, 2002.

3. United States Court of Appeals for the Tenth Circuit's order denying the Defendant/Appellant Ricky Brantley's Petition for Rehearing, dated June 5, 2002.

BASIS FOR JURISDICTION BY THE UNITED STATES SUPREME COURT

On December 1, 2000, the Honorable Frank H. Seay denied the defendant/appellant Ricky Brantley's written Motion to Suppress. The defendant subsequently entered a conditional plea under Fed. R. Crim Proc 11(a)(2) and 11(e)(1)(c) and received a sentence not to exceed 96 months with the condition that the defendant could remain free pending the perfection of all appeals.

On May 7, 2002, the United States Tenth Circuit Court of Appeals affirmed the ruling of the trial court, and the Defendant/Appellant subsequently filed a Petition for Rehearing which was denied on June 5, 2002.

Pursuant to Rule 10 of the Rules of the Supreme Court jurisdiction exists to review on a writ of certiorari when the United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of

appeals on an important matter. Further there is jurisdiction pursuant to Supreme Court Rule 10 when the United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by lower court, so as to allow the United States Supreme Court to exercise their supervisory power. The Defendant/Appellant contends that in this instance that the affirmation by the United States Court of Appeals for the Tenth Circuit is in conflict with other United States Court of Appeals decisions, is in conflict with decisions issued within the United States Court of Appeals for the Tenth Circuit, as well as stating that in affirming the trial court's decision to deny the motion to suppress herein that the United States Court of Appeals for the Tenth Circuit sanctioned a departure from the accepted and usual course of judicial proceedings. Defendant/Appellants contends that this a sufficient statutory basis to confer jurisdiction upon this Court to allow the Writ.

RELATIVE CONSITUTIONAL PROVISIONS, TREATISES, STATUTES AND ORDINANCES AND REGULATIONS

U.S.C.A. Const. Amend 4: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On July 27, 1999, agents of the United States Forest Service initiated an investigation as a result of their claim that they located a marijuana patch located on Weyerhauser

Timber Company land. The agents alleged that approximately fifty-three (53) plants were located in this patch. The property where the marijuana was allegedly located by agents was on land that is approximately 200 yards from land owned by the defendant/appellant Ricky Brantley, and is approximately 2 1/2 miles from United States Forest Service land.

On August 24, 1999, agents of the United States Forest Service returned to the marijuana patch described above and installed an unmanned surveillance system. The agents also allege that on this date that they counted the marijuana plants located on this particular patch an determined that there were 53 plants.

The agents alleged that from August 24, 1999 until December 6, 1999, they returned to this marijuana patch periodically to check for activity, reset the surveillance system, and take photographs of the plants involved. It is undisputed by all investigators that there exist no photographs depicting that there were 53 plants at the subject patch as stated in the transcript of the hearing on the Motion to Suppress on December 11, 2000 at page 26 beginning at line 2, to wit:

Q: Do you have any evidence that will show us a photograph of 53 plants that you all claim existed?

A: We have photographs, but it doesn't take a picture if all 53 at the same time.

Q: On this tape that was erased or reused, whatever term we're going to use, did it show some marijuana plants?

A: Yes.

Q: And so the number that we could see in December to actually be able to see the marijuana plants, that man erased or taped over?

A: The camera field of view was more so in the middle of the marijuana patch. So it didn't show all the plants, no, just a few of them.

Q: But it showed some?
A: It did show some, yes.
Q: In looking at the photographs I have, it appears that there was a lot of marijuana in August, and then in November when you say my client was the one in the patch, it doesn't appear to have very many marijuana plants at all. Is that a fair statement?
A: I would have to look at each individual photograph you're referring to.
Q: Okay.
MR. BAKER: May I—
THE COURT: You're not familiar with the evidence?
THE WITNESS: I beg your pardon?
THE COURT: It's your evidence, isn't it?
THE WITNESS: Yes.
THE COURT: And you're not familiar with it?

Investigators testified that they could not photograph the 53 plants because they could not be visualized, however, they allege that they were able to count 53 stalks which admittedly would require visualizing the plants and would allow for photographs to be taken. (Tr. Motion to Suppress 12/11/00 p. 52, lines 15-25)

On November 8, 1999, agents returned to the patch in question and state that there was evidence that a grower had returned to the patch and that a partial harvest had been made. Agents allege that they examined the video tape produced from the unmanned surveillance system and observed that on November 3, 1999, that a male subject was in the patch and that he was observed to have examined some plants, clipped off a section of a plant, pulled up a stalk and tossed it to the ground. Agents allege that they confirmed that the subject observed in the November 3, 1999, videotape was the defendant/appellant Ricky W. Brantley. It is undisputed that on November 8, 1999, no photographic evidence or video evi-

dence was produced to determine the number of remaining plants or to document what percentage of the patch had been harvested. (Tr. Motion to Suppress 12/11/00 p 64, lines 9-20).

On December 6, 1999 agents again returned to the marijuana patch in question. On this occasion the agents alleged that all of the remaining plants were harvested. Agents alleged that the manner of harvest was consistent with their observations of the activity of the subject alleged to be the defendant on November 3, 1999. Testimony at the hearing on the motion to suppress revealed the admission by one of the agents that in fact the method of harvest observed on December 6, 1999 was not consistent with the activity that was observed on November 3, 1999. (Tr. Motion to Suppress 12/11/00 pp 24/16-19 - p. 25/1-25; Affidavit ppg. 15)

On December 7, 1999 Agent Ryan of the United States Forest Service applied for a search warrant of the home of Ricky W. Brantley. In his affidavit in addition to the allegations listed above he stated that he was aware that Brantley had previously been convicted of a marijuana offense in 1984 in the State of Arkansas along with a listing of his expertise and belief that based upon his stated training that drug traffickers often maintain evidence of their drug activity including drugs within their residence. Agent Ryan alleged in his affidavit that the final harvest was conducted between December 1, 1999 and December 4, 1999 but failed to provide in the affidavit for search warrant that there was no video tape evidence of this harvest in spite of the fact that the unmanned surveillance system was still in place. (See affidavit ppg. 15) Agent Ryan further in the affidavit stated that the manner of harvest observed in December of 1999 was consistent with the activity of Brantley in the marijuana patch on the November 3, 1999 video tape. (Affidavit ppg. 15) As stated above Agent Ryan admitted under cross-examination in the motion to suppress hearing that the methods were not con-

sistent. Specifically beginning in the Tr. of the Motion to Suppress, p. 24, line 6 Agent Ryan testifies as follows:

Q: You indicated in your report that the harvest in December was the same, or similar, to the one in November?
A: Yes.
Q: Well, correct me if I'm wrong, but it appears that somebody has stripped the leaves off that.
A: Well, there's several photographs that have been take that day, some depicted stalks that were cut off near the ground. Some depicted stalks that were pruned up along the main trunk and just the branches taken off. So there's a variety of photographs there, and a variety of photographs that depict the —
Q: We're going to look—
A: —different techniques.
Q: We're going to look at all of them. But my question is, is you told that—the Grand Jury and in your report, you have indicated that the harvest in December was similar to the one that the defendant did in November?
A: That's correct.

Later in the same hearing Agent Ryan admits that the 57 seconds of activity of the defendant Brantley on November 3, 1999, in this marijuana patch does not depict the type of activity alleged to have been seen by Agent Ryan on December 6, 1999, as above depicted in photographs, and responds as follows in the Tr. of the Motion to Suppress at p. 56, lines 11 through 20 concerning his statements that the method of harvesting on 11-3-99 was consistent with his observations on 12-8-99:

"The method of harvest was consistent, as compared the harvest that took place on 11-3."

A: Yes.
Q: Would you agree with me that the video tape on 11-3 shows a subject walk into the field, cut down two

plants near the ground, lay them aside, pick up something from the ground and throw it, and that's it?

A: That something he took from the ground was the root ball....

Further, at p. 57, line 22:

Q: That tape does not show him stripping any stalks from their plants; does it? It doesn't show him stripping any leaves at all; does it?

A: No.

Q: And it doesn't show him cutting the top out of a plant four feet up and leave the stalk; does it?

A: No.

Q: And the December pictures show both of those things; don't they?

A: Yes

This line of questioning continues beginning at p. 68, line 25 as follows:

Q: You merely have fifty-seven seconds of two plants cut down near the ground and laid on the ground; is that correct?

A: That's correct.

Agent Ryan failed to state pertinent facts within his affidavit that would have been material to a finding of probable cause as well as establishing or failing to establish a sufficient nexus between the items to be searched for and the place to be searched. As already stated he did not provide the fact that there was no video tape of the alleged final harvest; he did not state that from August 24, 1999 when the unmanned surveillance system was placed until December 7, 1999 when it is alleged that it was observed that there was a final harvest completed that Ricky Brantley was only observed within this patch for less than one minute. In response to questioning at the motion to suppress beginning at p. 62, line 22 Agent Ryan stated:

Q: And it's fair to say that in this case a period of approximately four months went by during the time that you surveiled the field, and you have less than thirty seconds of tape that include a human being; is that correct?

A: Actually it's fifty-seven seconds.

Agent Ryan did not state that they had destroyed all of the other video tapes showing the marijuana patch between August 24, 1999 and December 6, 1999 except the excerpt depicting Ricky Brantley walking through the patch, but he did admit these facts during the motion to suppress hearing beginning in the transcript at p. 9, line 5:

Q: So can establish that, in fact, there was a tape, that the camera did come on and it did document some things, but in your opinion there were of no evidentiary value?

A: That is correct.

Q: And so you took it upon yourself to destroy it.

A: No, it wasn't destroyed.

Q: Was it erased?

A: It was either erased or placed back in service. And the actual running of the camera would erase it as it taped over the top of it.

Further admissions by Agent Ryan concerning his destruction of evidence are made beginning at p. 53, line 17 in the transcript of the motion to suppress, to-wit:

Q: Now, in this report you generated, which is about six pages of typing, is there anywhere in that written report that you provide all of this information we learned this morning, that there were pictures taken in December, that there were eleven tapes generated, that you decided to tape over them because they were

of no evidentiary value? Is that contained in your report anywhere?

A: On page 3, middle of the page, the last part of the paragraph says, "All the surveillance system was removed and photographs were taken by Ryan.

Q: And what day did that happen?

A: That was 12-6.

Continuing at p. 54, line 17:

Q: My question to you—and I didn't ask you if you reset The surveillance system. Maybe I didn't make myself clear. Do say anything about generating eleven tapes that you viewed?

A: No.

Continuing further at p. 55, line 3:

Q: Do you think it might be of significance to provide in your report that there were eleven tapes generated and that you destroyed everything but fifty-seven seconds? And I'm not bantering words with destruction. The evidence doesn't exist anymore. And all that's left is fifty-seven seconds from eleven tapes?

A: Well, it didn't seem important at the time, and it hasn't—in other cases it hasn't been significant—if there wasn't any evidence on the tape that showed somebody was there, I didn't keep it.

Q: Do you agree—and you've had a lot of experience as a police Officer—that the absence of is evidence for a defendant?

A: I guess in some cases it would be.

Agent Ryan did not provide in his affidavit that Ricky Brantley has cattle and that it is incumbent upon him to search for trespass cattle to avoid being sanctioned or fined by the United States Forestry Service. Agent Ryan did not state in his

affidavit that the unmanned surveillance system had malfunctioned and that this was the cause of the lack of video evidence of the final harvest. However, under examination at the motion to suppress Agent Ryan admitted that his explanation of a "malfunction" isn't what occurred. Agent Ryan's sworn testimony at the motion to suppress concerning whether or not the system malfunctioned was as follows beginning at p. 7 line 5:

Q: Did you in that report indicate that on December the 6th of 1999, you and Alford again checked the marijuana patch for further activity, and observed that all the plants had been harvested. The surveillance system did not record the harvesting due to a malfunction, but indications were that the harvest occurred sometime between 12-1 of '99, and 12-4 of '99.
Is that what you put in the report?

A: This statement is still true.

Q: So this equipment malfunctioned?

A: It may have been a poor choice of words. The equipment didn't work as we intended it to work.

Q: Would it be a fair statement that when we were here picking a jury, that in a conversation here at the courthouse that I had with you when we were questioning about this malfunction, and I had told the Court that I wanted a continuance because I wanted to look at the equipment, that I wanted to see—my experts to look at it to see how it could malfunction, that at that point you changed from malfunction to telling us that what had occurred was that it just wasn't tripped, and that the sensors didn't trip and so there wasn't anything—the tape never came on because there was no tripping of the sensor?

A: Are you referring to the conversation we had right over there.

Q: Somewhere in this area.

A: Okay. Those aren't my exact words, but I did tell you that malfunction was probably a poor choice of words.

The affidavit does not provide the information that there were 11 total tapes and that except for the 57 seconds on November 3, 1999 that Ricky Brantley is never seen in any of these tapes (See reference to transcript above). Agent Ryan does not provide in his affidavit that Ricky Brantley was never observed carrying anything away from the marijuana patch in question nor was he ever observed placing marijuana into any kinds of containers (Motion to Suppress Tr. p. 68, lines 16-24); he does not state that Ricky Brantley was never observed watering, planting, or fertilizing any of the plants in this patch (Motion to Suppress Tr. p. 73); he doesn't state that the only time that the plants were allegedly counted was in August of 1999, three (3) months before the Defendant is ever observed in the patch, albeit for only 57 seconds, and that he could not provide any information as to the quantity of plants present following August 24, 1999. (Motion to Suppress Tr. p. 85/9-25).

Agent Ryan provided testimony at the suppression hearing supporting the contention that there existed the probability that this patch was not harvested by the Defendant Ricky Brantley, but by someone else. Agent Ryan admitted, however, did not place in his affidavit for search warrant, that it was just as possible that some third party stranger was the person who conducted this so-called "final" harvest in early December 1999. Agent Ryan's testimony concerning this is found in the Motion to Suppress tr. at p. 87, beginning at line 7:

Q: And you don't have any idea whether someone else came into this patch and harvested some of it or not; do you?

A: Other than Mr. Brantley, no, I don't have any evidence to show that.
Q: Well, why is it that you all say there was fifty-three plants that he harvested?

Line 24:

Q: So when you got there, it had already been—what did you Call it?
A: Sexed. The male and female are determined well before that time.
Q: And you don't know who did that?
A: No, I don't.

Based upon the information provided in the affidavit (see affidavit in appendix) the magistrate issued a search warrant for the residence of Ricky Brantley.

On September 20, 2000 an indictment was issued charging Ricky W. Brantley with multiple charges, to-wit: Manufacturing marijuana (18 U.S.C. Sect. 841(a)(1); Maintaining a place for the purpose of distributing marijuana (18 U.S.C. Sect. 856(a)(1) and 18 U.S.C. Sect 2; Possession of Firearms after former conviction of a felony (18 U.S.C. Sect. 922(g)(1); Possession of firearms while in the commission of a drug trafficking offense (18 U.S.C. Sect. 924(c); and Possession of an unregistered firearm (26 U.S.C. Sect. 5861(d).

The defendant by and through his counsel at that time filed a motion to suppress on 21st day of November 2001 and such motion was heard on the 11th day of December. The transcript to this proceeding is included within the appendix. This motion hearing was had on December 11, 2000. The Court subsequently entered an order denying the defendant's motion to suppress in its entirety. The District Court in denying the Defendant's motion to suppress the evidence made the following statement:

> The Court finds the facts as follows.... (6)...The final harvest was consistent with the method of harvest as compared with the harvest of November 3, 1999 by Ricky Brantley.

This factual finding is erroneous in light of the testimony of the Government's own witness who ultimately admitted that the activity of Ricky Brantley observed in the 57 seconds of videotape is not consistent with the harvesting allegedly observed by the agents when they returned to the patch on December 6, 1999, and claim that the harvesting had been completed.

The Court held in its denial of the motion to suppress at p. 5, that "The Court finds that there is a sufficient connection between the drug activity observed in the investigation and a belief that evidence of drug activity could be found at the residence of the defendant to establish probable cause." The Court does not address the fact that there is no evidence whatsoever that Defendant Brantley was in this marijuana patch except for 57 seconds out of a 4 month investigation in spite of the fact that there was the installation of an unmanned surveillance system. The Court does not address the fact that the defendant was not observed by the video system to be conducting the "final harvest." The Court does not address the fact that the government agent not only failed to include within the affidavit that there was no video evidence of the "final harvest" but more importantly that the government agent had provided false information in his report indicating that the equipment had malfunctioned and that this was the cause of the absence of video evidence of the final harvest. Agent Ryan during testimony in the motion to suppress ultimately admitted that this was not true, but that several hours of video of this marijuana patch had been destroyed and only the 57 seconds of Ricky Brantley being present in the patch were preserved. The Court does not address the fact that the defendant Brantley was never observed watering, planting or doing any-

thing else to assist in the growth of the marijuana plants; that he was also never observed placing marijuana in sacks, or removing marijuana from the area of the patch and taking it to another location. More importantly the affidavit contains no allegations whatsoever of any illegal drug activity occurring at Ricky Brantley's residence, nor does the affidavit provide any statement that there is evidence that Ricky Brantley is a drug trafficker such as evidence of distribution or sales of marijuana, or even evidence of increased traffic flow at the Brantley residence.

The Court further provided in its order denying plaintiff's motion to suppress that "the patch in question has 53 large marijuana plants. Brantley was seen tending the plants on November 8, 1999." The evidence in its best light is that on August 24, 1999 some 2 1/2 months before the government alleges that the defendant Brantley was seen in this video tape that Agent Ryan alleges there were 53 plants stating they counted them. Yet inconsistent with this statement was Agent Ryan's contention that he did not photograph or video the plants to demonstrate the total number because he could not visualize the plants to photograph them. Further the court finds that the "Brantley was seen tending the plants on November 8, 1999." This statement and finding is also in error. The allegations pursuant to the agents report and the 57 second video tape was that on November 3, 1999, defendant Brantley was observed in the marijuana patch. However, there is no evidence that Brantley was "tending the plants". This statement would tend to create the illusion that Brantley was seen in the video providing some form of treatment, cultivation or care for all of the plants when it is undisputed all Brantley was seen doing on the only time that he was ever observed in the marijuana patch for a total of 57 seconds our of the four months that there was an unmanned surveillance system in the patch was clipping at a plant, picking up a couple of plants, throwing them on the ground, and walking

away. There exists absolutely no evidence whatsoever that the defendant Brantley harvested this marijuana field or that he took marijuana to his home. The District Court completely failed to take into consideration the fact that Brantley is never observed removing anything from this marijuana patch, packaging anything from this marijuana patch, or taking anything from this marijuana patch into their home.

As a result of the United States District Court Judge denying Brantley's motion to suppress the decision was made to enter a conditional plea pursuant to Fed. R Crim Proc. 11(e)(1)(c) and 11(a)(2) in which the defendant was allowed to maintain all of his appellate rights as to the issues of the denial of the Motion to Suppress and remain free until such time that all of his appeals were exhausted. The plea agreement provided that the most that Brantley would be sentenced to was 96 months. At the plea the United States District Judge did in fact sentence Brantley to 96 months and agreed to allow him to remain free until such time that all of his appeals were exhausted.

The defendant Brantley timely filed his appeal in United States Court of Appeals for the Tenth Circuit on August 27, 2001, arguing that the trial court erred in its refusal to grant the defendant Ricky Brantley's motion to suppress on the basis that the affidavit as presented by the United States Forest Service agent did not establish probable cause for the issuance of the search warrant and that there was no sufficient nexus existing between the items to be searched for and the place to be searched. This appeal was denied and the trial court was affirmed on the 7 day of May, 2002.

The United State Court of Appeals for the Tenth Circuit in its order affirming the trial court made the following statement, at page 5 of the Opinion:

> The district court denied the motion to suppress. It found that the drug activity observed in the marijuana patch

> bordering defendant's property, particularly given the fact of the final harvest, provided a sufficient basis for the magistrate judge to conclude that there was probable cause to believe drug contraband would be found at the defendant's residence.

The Circuit Court by ratifying the basis of the denial of defendant's motion to suppress affirms the trial court's denial of the motion to suppress in spite of the facts as supported by the sworn testimony of the USFS Agent Ryan at the hearing on the defendant Brantley's motion to suppress. This testimony includes the admission by Agent Ryan that the only evidence connecting Ricky Brantley to this marijuana patch is 57 seconds of him being in the subject patch. Further such affirmation is in spite of the fact that the Agent Ryan's allegations in his affidavit for search warrant omitted many facts known to him at the time of preparing the affidavit for search warrant and that were material to a finding of probable cause. Further it is clearly demonstrated within the testimony at the motion to suppress by Agent Ryan that his sworn testimony was inconsistent with his affidavit and his written report.

The Opinion of the Tenth Circuit Court of Appeals in it's opinion affirming the trial court's denial of the defendant's motion to suppress outlined the law providing that there must be a sufficient nexus between the contraband to be seized or the suspected criminal activity and the place to be searched. The Opinion further explained that evidence that a person may be guilty of a crime is not alone sufficient to search a person's home but that there must be additional evidence linking the person's home to the suspected criminal activity.

The Opinion, at p. 6 provides:

> Given the evidence in the affidavit that (1) the defendant's property bordered the marijuana patch, (2) the defendant was identified in the field cultivating and car-

> ing for the patch, and (3) the final harvesting of the field had been completed immediately prior to the search warrant application, the issuing magistrate judge reasonably could have inferred that the defendant had recently harvested a large quantity of marijuana plants and that the most likely place to store these plants and the implements used in the harvesting would be at his residence adjacent to the patch.

This statement within the opinion does not address material facts impacting the finding of probable cause and determining that that there is a sufficient nexus existing between the contraband to be searched for and the place to be searched. The fact that the defendant's property "bordered the marijuana patch" does not take into consideration the point raised in the motion hearings that the defendant was a cattle rancher and was required to routinely search for trespass cattle which could easily have taken the defendant into the marijuana patch which was 200 yards from his property. Agent Ryan when testifying at the defendant's motion to suppress hearing stated, beginning at p.86, lines 5:

> Q: Well, this isn't the only patch; is that correct?
> A: It's not the only patch on Weyerhauser land?
> Q: Right?
> A: No, there's other patches on Weyerhauser land.
> Q: And you tell me about how many.
> A: I couldn't.
> Q: Some people down there, just recently went off to the penitentiary for growing marijuana on Weyerhauser land?
> A: I don't know what you're referring to.
> Q: Do you know of anybody that lives in close proximity to Mr. Brantley, out in that area—and that is a pretty isolated area; isn't it?
> A: It's pretty isolated, yes.

Q: In that area out in there has there been other people who have recently gone to the penitentiary for growing marijuana on Weyerhauser land?
A: It's possible.
Q: It is not unusual for people who have cattle—And they do get to lease Weyerhauser land, do they not, and run their cattle kind of open range?
A: Some people do.
Q: And these people come across these marijuana patches quite frequently; don't they?
A: No, I wouldn't say quite frequently. No.
Q: Do they come across these patches occasionally?
A: We occasionally get information from people who use the land and tell us about the marijuana patch.
Q: And you don't have any idea whether someone else came into this patch and harvested some of it or not; do you?
A: Other than Mr. Brantley, no, I don't have any evidence to show that.

The statement that "the defendant was identified in the field cultivating and caring for the patch" is erroneous and inconsistent with the government's own testimony. Defendant Brantley was observed for 57 seconds between August 24, 1999, and December 6, 1999 walking through this patch, cutting something from a plant, pulling two plants up and throwing them down, then walking away. This is not sufficient to demonstrate that the defendant was caring for the patch. The government's own agent when cross-examined stated, beginning at page 56, line 7:

Q: Now, you said in this same page 3, "The surveillance system did not record the harvesting due to a malfunction, but indications were that the harvest occurred between 12-1 and 12-4. "The method of

harvest was consistent, as compared with the harvest that took place on 11-3."

A: Yes.

Q: Would you agree with me that the video tape on 11-3 shows a subject walk into the field, cut down two plants near the ground, lay them aside, pick up something from the ground and throw it, and that's it?

A: That something that he took from the ground was the root ball of each plant. He examined the root ball and then tossed it to one side.

Q: And where do you see that on the video, that it's the root ball?

A: Where do you see it?

Q: Uh-huh.

A: It's on the video.

Q: And where does the picture of the root ball visually exist, or is that an assumption you made from your years of training that when you—

A: He pulls it out of the ground and he holds it in front of him and looks at it.

Q: Does the video show him reach down and pull it out of the ground? You can't see his hand when it's at ground level; can you?

A: No.

Q: So you don't know whether he was pulling something from the ground or picking something up that already existed; do you?

A: No, it appears to me like he pulled it out of the ground and held it, looked at the root ball, and tossed it to one side. He does it twice.

Q: But you did not see his hand at the ground.

A: No.

Q: So again you've made an assumption, and we rely on your expertise to determine what he was doing.

A: That's correct.
Q: The tape does not show him stripping any stalks from their plants; does it? It doesn't show him stripping any leaves at all, does it?
A: No.
Q: And it doesn't show him cutting the top out of a plant four feet up and leave the stalk, does it?
A: No.
Q: And the December pictures show both of those things don't they?
A: Yes.
Q: And the November tape never shows him walk away with anything; does it?
A: No. The tape stops prior to him leaving the patch.

Further, beginning at page 68, line 16 of the transcript depicting the testimony of the Government, the testimony provides;

Q: And it would be fair to say that you don't have any evidence whatsoever of my client, Cindy Brantley, or the other defendant, Ricky Brantley, carrying any marijuana stalk from that field?
A: That's correct.
Q: You don't have any evidence on your video tapes of them putting marijuana stalks, leaves, buds, into any container system?
A: That's correct.
Q: You merely have fifty seven seconds of two plants cut down near the ground and laid on the ground is that correct?
A: That's correct.

The above testimony demonstrates the government's agent's admissions that there is no evidence of the defendant "cultivating and caring" for the marijuana patch. The evidence that exists is minimal and without dispute is merely "fifty

seven seconds of two plants cut down near the ground and laid on the ground." All of the other information that is referred to as "evidence" are the opinions and assumptions of Agent Ryan and not the result of any kind of demonstrative or objective evidence. The Court of Appeals also relying upon "(3) the final harvesting of the field had been completed immediately prior to the search...." fails to take into account the fact that there exists no evidence whatsoever that Ricky Brantley conducted this "final harvest" and as shown above the government agent admits that in fact the methods of harvesting were not consistent, and that his only evidence against Ricky Brantley was "fifty seven seconds of two plants cut down near the ground and laid on the ground."

The Tenth Circuit Court of Appeals in affirming the trial court relied upon the final harvest in supporting the issuing magistrate's finding of probable cause in the affidavit of the government. Additionally, this ruling fails to consider the government agent admitted that people living in that area come across marijuana patches while looking for trespass cattle, and it is undisputed that Ricky Brantley was a cattle rancher.

The only facts relied upon to allege probable cause to search existed and that there was a sufficient nexus between the items to be searched for and the place to be searched was this fifty seven seconds of Ricky Brantley laying two plants on the ground. everything else is assumption and speculation of Agent Ryan.

On May 20, 2002, following the United States Court of Appeals affirming the findings of the trial Court the defendant sought his petition for rehearing before the United States Court of Appeals for the Tenth Circuit alleging that the Circuit Court had misapprehended facts and incorrect legal principles arguing that the facts relied upon simply do not provide probable cause and do not show a sufficient nexus

between the contraband to be searched for and the place to be searched. On June 5, 2002 the defendant Ricky Brantley's Petition for Rehearing was denied.

ARGUMENT AND AUTHORITY TO SUPPORT GRANTING A WRIT OF CERTIORARI

Pursuant to Rules of the Supreme Court, Rule 10 it is provided that:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court considers:
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

It is the defendant's contention that this Petition for Writ of Certiorari should be allowed on the following basis: (1) that both the District Court and the Circuit Court of Appeals for the Tenth Circuit in determining that a sufficient nexus exists between the items to be searched for and the place to be searched is in conflict not only with another United States Court of Appeals, but that there are conflicting decisions concerning this point within the United States Court of Appeals for the Tenth Circuit, *United States v. Nolan*, 199 F. 3d 1180 (10th Cir. 1999). Nolan, supra takes up the issue as to whether or not a sufficient nexus existed between the items to be searched for and the place to be searched. In this discussion, Nolan, at 1183 outlines findings of other United States courts of appeal on this issue. The Court explains:

> The test is whether the facts presented in the affidavit would "warrant a man of reasonable caution" to believe that evidence of a crime will be found at the place to be searched, *Texas v. Brown*, 460 U.S. 730 742, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (plurality).

The Court in *Nolan*, supra further outlined the holdings of other United States courts of appeal as follows:

> ...at least three of our sister circuits had held in cases involving drug traffickers that "observations of illegal activity outside of the home can provide probable cause for the issuance of a search warrant, even in the absence of al allegation that any illegal activity occurred in the home itself." *United States v. Thomas*, 989 F. 2d 1252, 1254 (D.C. 1993) (per curiam) [FN2] Accord *United States v. Williams*, 974 F. 2d 480, 481-82 (4th Cir. 1992)(per curiam) (upholding magistrate judge's determination of probable cause even though affidavit did not contain any facts indicating drugs were located at drug dealer's residence); *United States v. Angulo-Lopez*, 791 F. 2d 1394, 1399 (9th Cir. 1986)(despite affidavit's lack of direct evidence, probable cause existed to search defendant's residence based on reasonable inference that suspected drug dealer would keep incriminating evidence at his residence).

The Sixth Circuit has issued conflicting decisions concerning the issue of whether or not a sufficient nexus exists between the items to be searched for and the place to be searched. *United States v. Schultz*, 14 F. 3d 1093, 1097-98 (6th Cir. 1994) held that evidence that the defendant was a drug dealer and owned a safe deposit box along with the officer involved providing the opinion that drug traffickers are likely to keep incriminating evidence in such a safe deposit box was held to be insufficient to establish probable cause for the issuance of a search warrant of such lock box. However, in

contrast to the *Schultz* decision the Sixth Circuit in *United States v. Davidson,* 936 F. 2d 856, 859-60 (6th Cir. 1991) upheld a finding of probable cause that evidence of drug trafficking would be found at a defendant's residence.

The Tenth Circuit has held differently from the law of their sister circuits, *Nolan*, at 1183. The Tenth Circuit has upheld that there must be a sufficient nexus between the place to be searched and the items to be seized, *United States v. Hargus,* 128 F. 3d 1358, 1362 (10th Cir. 1997). The Tenth Circuit has provided that the issuing magistrate judge "may draw reasonable inferences from the material provided in the warrant application," *United States v. Rowland*, 145 F. 3d 1194, 1205 (10th Cir. 1998). However, the Tenth Circuit in contrast to other Circuit Courts of Appeals has not ever held that "the mere observation of repetitive illegal drug activity outside a suspect's residence by itself is sufficient to establish probable cause for a search of the suspect's residence, Nolan, at 1183. Further, the Tenth Circuit in Rowland, at 1204 emphasized that "probable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead there must be additional evidence linking the person's home to the suspected criminal activity."

More important to supporting the contention that the Court should allow the writ in this instance is the statement of the Court in Nolan, at 1184 as follows:

> Given the state of the law in our circuit and the differences of opinion it elicits, this panel chooses not to decide in this instance whether the affidavit in support of the search warrant was sufficient to sustain the magistrate judge's finding that incriminating evidence would likely be found inside Defendant Nolan's residence. Instead, we exercise our discretion to decide this case under the good-faith exception to the exclusionary rule established in *United States v. Leon,* 468 U.S. 897, 104

> S. Ct. 3405, 82 L. Ed. 2d 677 (1984), **and leave for another day the probable cause inquiry.** (emphasis added)

In this matter the Tenth Circuit Court of Appeals upheld the district court's denial of the defendant Brantley's Motion to Suppress. The body of the opinion acknowledges the evidence relied upon in determining that a sufficient nexus does exist between the items to be seized, and the place to be searched, to-wit the residence of Ricky Brantley. The Tenth Circuit Court states as follows at page 6:

> Affording proper deference to the issuing magistrate judge's Determination, we conclude the search warrant asserted sufficient facts to establish probable cause that evidence of criminal activity would be found in the defendant's residence. Given the evidence in the affidavit that (1) the defendant's property and residence bordered the marijuana patch, (2) the defendant was identified as the individual in the field cultivating and caring for the patch, and (3) the final harvesting of the field had been completed immediately prior to the search warrant application,

This finding as argued above is not consistent with the facts as developed from the agent involved at the hearing on the defendant's motion to suppress. As argued above and outlined in the listed text from the hearing on the Defendant's Motion to Suppress the above listed statement are insufficient to confer a sufficient nexus between the items to be seized and the place to be searched.

The fact that the defendant's property is 200 yards away from the subject marijuana patch is diminished by the admission of the agent found in the transcript from the motion to suppress, at p. 85, as follows:

Q: Would it be a fair statement, Agent, that there is a lot of marijuana growing in—on Weyerhauser land in and around this area?
A: It all depends upon what you consider to be "a lot."
Q: Well, this isn't the only patch; is that correct?
A: No, there's other patches on Weyerhauser land.
Q: In that area out in there has there been other people who have Recently gone to the penitentiary for growing marijuana on Weyerhauser land?
A: It's possible.
Q: It is not unusual for people who have cattle—And they do get to lease Weyerhauser land, do they not, and run their cattle kind of open range?
A: Some people do.
Q: Do they come across these patches occasionally?
A: We occasionally get information from people who use the land and tell us about the marijuana patch.
Q: And you don't have any idea whether someone else came into this Patch and harvested some of it or not; do you?
A: Other than Mr. Brantley, no, I don't have any evidence to show that.

Secondly, the Tenth Circuit in their opinion affirming the trial court states that the defendant was seen in the field "cultivating and caring for the patch." This statement is also inconsistent with the evidence as adduced at the hearing on the motion to suppress from Agent Ryan. The investigating agent for this matter admitting that the only evidence that they have at p. 68, line 25 is as follows:

Q: You merely have fifty-seven seconds of two plants cut down near the ground and laid on the ground; is that correct?
A: That's correct.

This statement by the investigating and reporting agent provides that they do not have evidence of Ricky Brantley "cultivating and caring for the patch."

Lastly the Tenth Circuit in their opinion affirming the trial court refers to The final harvest occurring immediately before applying for and serving the search warrant. However, the evidence taken in the light most favorable to the government from their own agent's testimony was that there was no evidence in existence that Ricky Brantley was in the field between December 1, 1999 and December 4, 1999 the dates that they allege this final harvest occurred. Additionally, there is no evidence that Ricky Brantley was ever in this patch for any period of time exceeding 57 seconds on November 3, 1999. As outlined and referenced above agent Ryan admits that there were eleven additional tapes depicting the patch and that he destroyed that evidence allegedly because there were no humans seen in the tape, however, and most importantly it is undisputed that Ricky Brantley was not seen in the patch in any of those tapes.

This opinion when compared with other Tenth Circuit decisions, Sixth Circuit Decisions and other sister courts proves that there is conflict between the circuit courts concerning when there is a sufficient nexus existing between the items to be seized and the place to be searched. This is sufficient to allow the Writ of Certiorari in this matter pursuant to Rule 10 of the Rules of the Supreme Court.

Next defendant would urge that this Court allow the writ on the basis that the Tenth Circuit Court of Appeals in affirming the decision of the trial court in this matter has sanctioned a departure by a lower court that has so far departed from the accepted and usual course of judicial proceedings. In support of this contention the defendant would reurge the arguments listed above concerning an insufficient nexus existing between the items to be seized and the place to be searched.

The defendant argues that the affiant omitted material facts from the affidavit that if included in the affidavit would have vitiated the finding of probable cause. *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) provided as follows:

> In deciding today that, in certain circumstances, a challenge to a warrants veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o warrants shall issue but upon probable cause supported by oath or affirmation...

The case of *Jones v. United States*, 362 U.S. 357, 270-71 (1960) held that "it would be an unthinkable position upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment."

In order to succeed in defeating a finding of probable cause pursuant to the affidavit for search warrant it is necessary to show (1) that a false statement knowingly and intentionally or with reckless disregard for the truth was included in the affidavit, and that (2) with the false material allegations set aside the affidavit's content is insufficient to establish probable cause. The same analysis applies to the omission of material facts in that if the material facts that were omitted when added to the allegations contained within the affidavit vitiate probable cause the warrant should be suppressed. *United States v. Buchanan,* 167 F. 3d 1207 (8th Cir. 1999); *United States v. Gladney*, 48 F. 3d 309, 313 (8th Cir. 1995); *United States v. Humphreys,* 982 F. 2d 254, 258 n. 2 (8th Cir. 1992), *cert denied* 510 U.S. 814, 114 S. Ct. 61, 126 L. Ed. 2d 31 (1993). Based upon the cited authority if the affidavit either as so redacted or supplemented is not sufficient to establish probable cause the warrant will be voided and the evidence gathered pursuant to it will be excluded.

In applying the facts at issue to the existing authority it is clear that the warrant would not be sufficient to establish probable cause if the material facts omitted from the affidavit were supplemented to the affidavit. The material facts as outlined above that should be supplemented to the affidavit in question include the following: (1) that the marijuana patch in question is at least 200 yards in distance from Ricky Brantley's property; (2) that there were other patches of marijuana growing on Weyerhauser land such as this one; (3) that Ricky Brantley is a cattle rancher and is required to keep up with any trespass cattle he may have as other ranchers in the are do and that ranchers in conducting such activity have come across marijuana patches; (4) that in the recent past other persons suspected of cultivating marijuana in that area have been caught and sentenced to the penitentiary; (5) that the only evidence that exists of Ricky Brantley have any connection with this marijuana patch is that he was observed walking through the patch on November 3, 1999, clipping something off of a plant, and pulling up what appears to be two plants, laying them to the side and walking off; (6) that the entire time that Ricky Brantley was observed at any time in this marijuana patch was for 57 seconds on November 3, 1999, and was never observed in the patch again; (7) that there existed eleven tapes from this particular patch from the unmanned surveillance system that was in place from August 24, 1999, until December 6, 1999 and that these tapes did depict the marijuana field but that the agent allowed them to be taped over deciding independently that the absence of a human being in them caused them to be of no evidentiary value; (8) that Ricky Brantley was never seen planting, watering, tilling, or fertilizing this marijuana patch; (9) that Ricky Brantley was never observed in this marijuana patch to take anything away from the patch or to package any of the marijuana growing there and remove it from this patch; (10) that there exists no evidence that Ricky Brantley was distributing marijuana from of his residence; (11) that there was

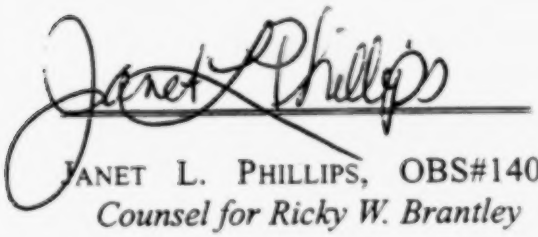
no direct evidence of any kind that Ricky Brantley was conducting any kind of drug activity at his residence; (12) that absent the observation of Ricky Brantley in this marijuana patch that there existed absolutely no evidence that Ricky Brantley was a "drug trafficker." (13) that when the agents returned to the patch on December 6, 1999 and speculated that a final harvest had occurred between December 1, 1999 and December 4, 1999 that there was no evidence of any kind that Ricky Brantley was involved in this final harvest (14) the allegation that there was a malfunction in the unmanned surveillance system should not have been included within the affidavit due to the fact as proven above it is a false statement.

All of the above facts are proven in the above cited excerpts from the record from the defendant's motion to suppress hearing held on December 11, 2000. All of the above facts were known to the affiant, agent Ryan at the time of the preparation of the affidavit for search warrant but he failed and refused to place them into the affidavit for search warrant for the residence of Ricky Brantley. All of the above listed facts are material, and when supplemented to the affidavit or redacted from the affidavit vitiate the finding of probable cause. This law is well established. The United States District Court in denying the motion to suppress departed from the accepted and usual course of judicial proceedings, and the Tenth Circuit Court of Appeals sanctioned this departure. This is sufficient pursuant to Rule 10 of the Rules of the Supreme Court to allow the instant writ.

CONCLUSION

WHEREFORE, defendant Ricky Brantley respectfully requests based upon the arguments alleged herein that his Petition for Writ of Certiorari be allowed.

Respectfully submitted,



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APPENDIX

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Filed Dec. 1, 2000
Case. No. CR-00-59-S

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICKY W. BRANTLEY and CINDY BRANTLEY,

Defendants.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

Before the court for its consideration is a motion to suppress filed by the defendant Ricky W. Brantley. A hearing was held on the motion on December 1, 2000. The motion seeks to exclude all evidence seized pursuant to the search warrant executed on December 13, 1999, arguing the search warrant was issued without probable cause making the subsequent search unreasonable and illegal. The defendant also seeks to exclude all testimonial evidence against the defendant, including all statements and alleged admissions made by defendant. The plaintiff appeared by and through its attorney Mr. Dennis A. Fries and the defendant appeared by and through his attorney Mr. Donn Baker. Having heard the evidence and considered the arguments of the parties, the court concludes the defendant's motion should be denied.

The court finds the facts as follows. On December 7, 2000, Douglas Ryan, a Special Agent with the United States Department of Agriculture, United States Forest Service, (hereinafter "U.S.F.S."), requested a search warrant for the residence of defendant. In the affidavit, Ryan stated the following in regard to Ricky Brantley:

> (1) On July 27, 1999, U.S.F.S. Law Enforcement Officer Gary Rose located a marijuana patch in McCurtain County, Oklahoma. The marijuana patch was located in a small drain and evidence was observed that the area had been used in the years past for growing marijuana. The marijuana patch was located on Weyerhaeuser Timber Company land and borders property owned by Ricky Brantley.
>
> (2) On August 24, 1999, USFS Officer Rose, USFS Officer Alford and USFS Special Agent Douglas Ryan returned to this area and counted 53 large marijuana plants that appeared to be well taken care of. A non-manned surveillance system (video) was installed and samples of the marijuana were taken by Rose and field tested positive.
>
> (3) From August 24, 1999 through November 17, 1999, Ryan, Rose, Alford and USFS John Ray, returned to the site to check for activity and to reset the surveillance system. The condition of the patch on November 8, 1999, indicated that the grower had been there and harvested some of the plants and pruned some of the buds. The video tape revealed that the defendant was in the field on or about 11/3/99, at or around 1:50 p.m. The video depicts the suspect examining the plants and using hand clippers to cut two of the plants, then pulling up the

stumps and roots systems and tossing them off to the side. The suspect then walks off toward more marijuana plants (off view of camera) with the clippers in his hand. The suspect in the video tape is described as a white male, middle-aged, with a mustache, wearing a camouflaged colored ball cap and jacket.

(4) On November 8, 1999, Alford viewed the image from the video surveillance tape and recognized the subject cutting the marijuana plants to be Ricky Brantley.

(5) On November 12, 1999, Alford and State Division of Forestry Officer Terry Gregg went to Ricky Brantley's residence to inquire about some trespass cattle that belonged to him in the Hochatown area and also needed to inquire about a fire that occurred near his property earlier in the month. Alford met Brantley at the residence and confirmed that the subject in the video was Ricky Brantley.

(6) Between December 1, 1999 and December 4, 1999, the final harvest of the marijuana was accomplished by the grower. The final harvest was consistent with the method of harvest as compared with the harvest on November 3, 1999 by Ricky Brantley. All the marijuana buds were clipped off with clippers and some of the stalks were pulled from the ground and tossed to the side.

(7) The affiant was aware that Ricky Brantley was convicted of a felony violation of the Uniform Controlled Substance Act in Polk County, Arkansas on August 22, 1984.

> (8) The affiant stated that he believed that Brantley is a manufacturer of marijuana and has secured in his possession marijuana, and/or implements used in the cultivation, manufacturing and distribution of marijuana and/or firearms. Based on the affiant's experience as a law enforcement officer and the training received, it is believed that Brantley will have marijuana at his residence as well as other indicia of marijuana manufacturing and distribution.

Defendant has sought suppression of the evidence seized at his residence on the night of December 13, 1999, stating that the search warrant at issue was not based on probable cause. Defendant argues there is nothing in the affidavit that would cause a person to believe marijuana would be at the defendant's residence at the time of the search or at anytime thereafter.

The Fourth Amendment provides "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; *United States v. Mesa-Rincon*, 911 F.2d 1433, 1436 (10th Cir. 1990). The standard to be used for determining probable cause is a common sense one. *United States v. Wicks*, 995 F.2d 964, 972 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 482 (1993). Affidavits submitted in support of a probable cause determination are to be judged by the totality of the circumstances standard outlined by the Supreme Court in *Illinois v. Gates*, 462 U.S. 213 (1983). Under *Gates*, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability

that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is simply to ensure the magistrate had a substantial basis for concluding probable cause existed. *Id.* at 238-239.

The Fourth Amendment's preference for warrants has led courts to be more inclined to affirm a law enforcement officer's determination of probable cause when it is supported by a search warrant. *United States v. Ventresca*, 380 U.S. 102 (1965); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. $149.442.43 in United States Currency*, 965 F.2d 868, 872 (10th Cir. 1992).

In the affidavit for search warrant, Special Agent Douglas Ryan sets out his qualifications for investigating drug activity. He states that he has been employed as a law enforcement officer for 25 years and has been involved in at least 100 investigations involving the growing, cultivation and distribution of marijuana. Special Agent Ryan also states that he has training in this area. He then sets forth some of the standard activities of drug traffickers. Special Agent Ryan then sets forth the activities of the investigation as they relate to Ricky Brantley. He then enumerates the items he believes to be at the defendant's residence that, from his experience, are associated with drug activity.

The court finds there is a sufficient connection between the drug activity observed in the investigation and a belief that evidence of drug activity could be found at the residence of the defendant to establish probable cause. The affidavit sets forth in detail the surveillance that had taken place and the reasons why the affiant believed evidence of drug activity would be found at the home. Here, the court finds from a totality of the circumstances, including the personal knowledge, training, and experience of the affiant, Officer Ryan, as set out in the affidavit, that there was a substantial basis to believe evidence of a crime would be found at the place described in the affi-

davit and search warrant. "In dealing with probable cause, . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). A magistrate's determination of the existence of probable cause must be given considerable deference. *United States v. Wicks*, 995 F.2d 964, 972 (10th Cir. 1993), *cert. denied*, 510 U.S. 982, 114 S.Ct. 482, 126 L.Ed.2d 433 (1993).

In support of his argument that there is no connection between defendant's drug activity and a search of his home, defendant cites *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998). However, *Rowland* can be distinguished on its facts. *Rowland* involved the issuance of an anticipatory search warrant for Rowland's residence. The warrant allowed investigators to search Roland's residence once the package containing the video tapes was brought into the residence. The court held the warrant was not supported by probable cause and was invalid. In reaching this holding the court stated:

> Given the absence of any facts in the affidavit linking the contraband to Rowland's home, the magistrate had no information from which to determine, at the time he issued the warrant, there was probable cause to believe the contraband would be at Rowland's residence when the search was to take place. *Id.* at 1206.

The affidavit in the case at bar states that an investigation of the area had taken place since July 27, 1999. The marijuana patch in question was located on land that borders property owned by Ricky Brantley. The patch in question had 53 large marijuana plants. Brantley was seen tending the plants on November 8, 1999. The final harvest between December 1,

1999 and December 4, 1999 of the plants was consistent with the method of harvest used by Brantley on November 8, 1999. Thus, this court finds in the case at bar, there is sufficient information and facts contain within the affidavit from which the magistrate could determine there was probable cause to believe that contraband would be at defendant's residence when the search was to take place. Accordingly, the court finds Rowland inapplicable.

CONCLUSION

The court finds the search warrant was properly issued upon a legally sufficient affidavit containing legally obtained probable cause.The defendant's motion to suppress the evidence seized pursuant to the search warrant and to suppress statements made is DENIED.

IT IS SO ORDERED this 1st day of December, 2000.

/s/ FRANK H. SEAY
Frank H. Seay
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed May 7 2002
Patrick Fisher Clerk

[handwritten]
Pet for Rehearing
due May 21, 2002
must be mailed May 20, 2002

No. 01-7069
(D.C. No. 00-CR-59-S)
(E.D. Oklahoma)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICKY BRANTLEY,

Defendant-Appellant.

Before

EBEL, HOLLOWAY, and MURPHY, *Circuit Judges.*

ORDER AND JUDGMENT*

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Defendant Ricky Brantley was indicted for manufacturing marijuana, maintaining a place for the purpose of distributing marijuana and three illegal firearm possession charges. He entered a conditional guilty plea to one of the counts, possession of a firearm after a former felony conviction in violation of 18 U.S.C. § 922(g)(1), but reserved the right to appeal the district court's denial of his motion to suppress evidence. *See* Fed. R. Crim. P. 11(a)(2) (providing that a defendant, with approval of the court and consent of the government, may enter conditional guilty plea and reserve right to appeal an adverse determination of pretrial motion). Pursuant to the plea agreement, the defendant was sentenced to ninety-six months in prison and thirty-six months of supervised release. He now appeals the district court's denial of his motion to suppress. This court exercises jurisdiction pursuant to 28 U.S.C. § 1291 and affirms.

BACKGROUND

In July 1999, United States Forest Service (USFS) law enforcement officer Rose discovered a patch of marijuana plants growing on land owned by the Weyerhaeuser Timber

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Company in Broken Bow, Oklahoma. The marijuana patch bordered property owned by the defendant. Evidence indicated the patch had been used in years past for growing marijuana. In August 1999, USFS Agents Ryan, Alford and Rose returned to the patch and counted fifty-three large, well-tended marijuana plants. Samples of the plants tested positive for marijuana. The agents installed a stationary, non-manned video surveillance system in the patch, which periodically monitored a section of the patch from August through November, 1999. Throughout this period, the USFS agents returned to the site to check for activity and reset the surveillance system.

The condition of the patch on November 8, 1999, indicated that a grower had been there and harvested some of the plants and pruned some of the buds. The agents viewed the recent video tape, which revealed that an individual had entered the patch on the afternoon of November 3, 1999. The man in the video is described as a white, middle-aged male, with a mustache, wearing a camouflage-colored ball cap and jacket. The video showed the individual in the patch examining the plants, clipping some plants with a hand clipper and removing others by pulling up the stumps and tossing them off to the side.[1] USFS Agent Alford viewed the video on Novem-

[1] In his opening brief, the defendant disputes that the video shows a clear image of the individual in the patch on November 3, 1999, and claims the video tape only shows the individual looking at a plant and pulling something up and tossing it away, not examining the plants or using clippers. We do not address these claims, however, because the defendant neither disputed the video tape evidence in his motion to suppress before the district court, nor included the video tape in the record on appeal. *See United States v. Vasquez*, 985 F.2d 491, 494 (10th Cir. 1993) (holding court unable to rule on issue when the record fails to include copies of the evidence needed to decide issue on appeal); *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (holding court will generally not consider arguments presented for the first time on appeal).

ber 8, 1999, and recognized the man in the patch as the defendant.

On November 12, 1999, USFS agents, including Agent Alford, went to defendant's home to question him about cattle of his that were trespassing in a nearby area and about a fire on his property earlier that month. Agent Alford confirmed that the man seen in the video was the defendant. The USFS agents testified that, between December 1 and December 4, 1999, the final harvest of the patch was completed, evidenced by the fact that all of the marijuana buds had been clipped off and some of the stalks had been pulled out and tossed to the side.

USFS Agent Ryan applied for a search warrant for defendant's residence, on defendant's property bordering the marijuana patch. Agent Ryan's supporting affidavit set forth all of the foregoing information concerning the USFS investigation. Further, Agent Ryan testified that he was aware the defendant had a 1984 Arkansas felony drug conviction. Agent Ryan testified that he had been a law enforcement officer with the USFS for twenty-five years and had been involved in at least 100 investigations involving marijuana cultivation and distribution. Agent Ryan expressed his opinion, based on this experience, that the defendant would likely have at his residence evidence of marijuana and/or implements used in the cultivation, manufacture and processing of marijuana, as well as other indicia of marijuana manufacturing and distribution, including firearms. The magistrate judge authorized the search warrant for defendant's residence.

During the search of defendant's residence, USFS agents located marijuana, tools used to cultivate marijuana, marijuana plants in various stages of drying, and numerous firearms. Defendant moved to suppress the evidence seized during the search of his residence, claiming the evidence in the supporting affidavit was insufficient to cause a person to

believe that marijuana or firearms would be found inside his residence. The district court denied the motion to suppress. It found that the drug activity observed in the marijuana patch bordering defendant's property particularly the fact of the final harvest, provided a sufficient basis for the magistrate judge to conclude there was probable cause to believe drug contraband would be found at defendant's residence.

ANALYSIS

"We review de novo the district court's probable cause determination." *United States v. Nolan*, 199 F.3d 1180, 1182 (10th Cir. 1999). Our review of the magistrate judge's issuance of a search warrant is more deferential, however. *Id.*

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , there is ate. probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.

Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (quotation omitted). "When reviewing a district court's denial of a motion to suppress, we consider the totality of the circumstances and view the evidence in a light most favorable to the government." *United States v. Long*, 176 F.3d 1304, 1307 (10th Cir. 1999).

"We accept the district court's factual findings unless those findings are clearly erroneous." *Id.* Probable cause requires a nexus between the contraband to be seized or the suspected criminal activity and the place to be searched. *United States v. Rowland*, 145 F.3d 1194, 1203 (10th Cir. 1998). "Probable

cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person's home to the suspected criminal activity." *Id.* at 1204. However, there need not be direct evidence or personal knowledge that the items sought are located at the place to be searched. *United States v. $149,442.43 in U.S. Currency*, 965 F.2d 868, 874 (10th Cir. 1992). The affidavit supporting the search of a suspect's residence is sufficient when it describes circumstances from which a person of reasonable caution could infer that evidence or contraband will be found there. *Id.*

Affording proper deference to the issuing magistrate judge's determination, we conclude the search warrant affidavit asserted sufficient facts to establish probable cause that evidence of criminal activity would be found in defendant's residence. Given the evidence in the affidavit that (1) the defendant's property and residence bordered the marijuana patch, (2) the defendant was identified as the individual in the field cultivating and caring for the patch, and (3) the final harvesting of the field had been completed immediately prior to the search warrant application, the issuing magistrate judge reasonably could have inferred that the defendant had recently harvested a large quantity of marijuana plants and that the most likely place to store these plants and the implements used in the harvesting would be at his residence adjacent to the patch. *See United States v. Reyes*, 798 F.2d 380, 382 (10th Cir. 1986) ("It is reasonable to assume that certain types of evidence would be kept at a defendant's residence and an affidavit need not contain personal observations that a defendant did keep such evidence at his residence."); *see also Rowland*, 145 F.3d at 1205 (holding that issuing judge "may draw reasonable inferences from the material presented in the warrant application."). The affidavit also included the opinion of

Agent Ryan, who has substantial expertise and training in investigations relating to marijuana cultivation, that marijuana and other indicia of marijuana cultivation would be located at defendant's residence. This court has "recognized that courts often rely on the opinion of police officers as to where contraband may be kept." *$149,442.43 in U.S. Currency*, 965 F.2d at 874. In short, contrary to defendant's claim, the totality of these facts do provide a reasonable, commonsense basis for believing that marijuana and related contraband would be found in his residence.

The decision of the district court denying defendant's motion to suppress is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

ORDER DENYING THE DEFENDANT'S PETITION
FOR REHEARING
WHICH WAS ENTERED ON JUNE 5, 2002 IS OMITTED
DUE TO THE FACT THAT THE COPY OF SUCH ORDER
CAN NOT BE LOCATED BY COUNSEL FOR DEFEN-
DANT OR BY COUNSEL FOR THE GOVERNMENT

STATE OF OKLAHOMA
COUNTY OF MUSKOGEE

AFFIDAVIT

I, Douglas G. Ryan, having been duly sworn do hereby state and depose as follows:

That I am a Special Agent with the United States Department of Agriculture, U. S. Forest Service, having been so employed as a law-enforcement officer for the past 25 years. In the course of my employment I have been involved in at least 100 investigations involving the growing, cultivation and distribution of marijuana. That I have received training in the growing, cultivation and distribution of marijuana including training from U.S. Drug Enforcement Administration, Federal Law Enforcement Training Center in Glynco, GA., and the Criminal Justice Inst., Ocala, FL.

Based on my training and experience, I know the following to be true:

1. That drug traffickers often place assets in the names of others to avoid detection by law enforcement, but keep these assets and exercise dominion and control over them;

2. That drug traffickers often maintain on hand large amounts of U. S. Currency or other negotiable items in order to maintain and finance their ongoing controlled substance business;

3. That drug traffickers maintain books, records, receipts, notes, ledgers, money orders, and other papers relating to the transportation, distribution, and manufacture of marijuana, long after the entry in books or ledgers, and maintain these records where they have ready access to them;

4. That it is common for drug traffickers to secrete contraband, proceeds of drug sales, and records of drug transactions in secure locations, within their residence and to conceal them from law enforcement authorities;

5. That persons involved in drug trafficking often conceal in their residences caches of drugs, large amounts of U. S. Currency, financial instruments, and other items of value and/or proceeds of drug transactions relating to obtaining, transferring, secreting or spending of large sums of money made from engaging in drug trafficking;

6. That drug traffickers commonly maintain addresses and telephone numbers in books or papers which reflects names, addresses, and telephone numbers for their associates in the drug trafficking community;

7. That drug traffickers take or cause to be taken photographs of them, their associates, their property and their products;

8. That drug traffickers usually keep paraphernalia/equipment/supplies for packaging, cutting, weighing, cultivating, and distribution of the marijuana, and that these items include, but are not limited to, scales, plastic bags, cutting implements, growing pots, insecticides, fertilizers, and other growing supplies.

9. The following information is provided in support of an application for search warrant of the residence of Ricky W. BRANTLEY, Route 3, Box 291, Broken Bow, Oklahoma.

10. On or about 7/27/99, U.S. Forest Service Law Enforcement Officer Gary Rose located one marijuana patch in Section 15, Township 5S, Range 23E in McCurtain County, OK just north of the North Pole Store (Highway 3/7) about 2 1/2 miles. This marijuana patch was located in a small drain and

evidence was observed that the area had been used in years past for growing marijuana. This marijuana patch is located on Weyerhaeuser Timber Company land and borders property owned by Ricky W. BRANTLEY.

11. On 8/24/99, Officer Rose, USFS Officer James Alford, and USFS Special Agent Douglas Ryan returned to the area and, counted 53 large marijuana plants that appeared to be well taken care of. A non-manned surveillance system (video) was installed and samples of the marijuana Were taken by Rose and field tested positive for marijuana (THC).

12. From 8/24/99 through 11/17/99, your Affiant, Rose, Alford, and USFS Officer John Ray, returned to the site to check for activity, each time resetting the surveillance system for future use. The condition of the' patch on 11/8/99 indicated that the grower had been there and harvested some of the plants and pruned some of the buds. The video tape revealed that the suspected grower was in on or about 11/3/99 at on or about 1:50 PM. The video depicts the suspect examining the plants and using hand clippers to cut two of the plants; then pulling up the stumps and root systems and tossing them off to the side. The suspect then walks off toward more marijuana plants (off-view of camera) with the clippers in his hand. The suspect in the video tape is described as a white.male, middle aged, with a mustache, wearing a camouflaged colored ball cap and jacket.

13. On 11/8/99, Alford viewed the image from the video surveillance tape and recognized the subject cutting the marijuana plants to be Ricky W. BRANTLEY.

14. On 11/12/99, Alford and State Division of Forestry Officer Terry Gregg went to Brantley's residence to inquire about some trespass cattle that belonged to him in the Hochatown area and also needed to inquire about a fire that occurred near

his property earlier in the month. Alford met Ricky W. BRANTLEY at the residence and confirmed that the subject in the video was Ricky W. BRANTLEY.

15. Between 12/1/99 and 12/04/99, the final harvest of the marijuana was accomplished by the grower. The final harvest was consistent with the method of harvest as compared with the harvest on 11/3/99 by Ricky W. BRANTLEY. All the marijuana buds were clipped off with clippers and some of the stalks were pulled from the ground and tossed to the side.

16. Additionally, your Affiant knows that Ricky W. BRANTLEY was convicted of a felony violation of the Uniform Controlled Substance Act in Polk County, Arkansas, on August 22, 1984.

17. Based on the above assertions, your Affiant believes that Ricky W. BRANTLEY is a manufacturer of marijuana and has secured in his possession of marijuana, and/or implements used in the cultivation, manufacturing and distribution of marijuana, and/or firearms. Based on the my experience as a Law Enforcement Officer and the training I've received, I believe Ricky W. BRANTLEY to have at his residence marijuana and all other indicia of marijuana manufacturing and distribution.

18. Through the course of this investigation your Affiant has determined that Ricky W. BRANTLEY resides at Route 3, Box 291, Broken Bow, Oklahoma, more fully described in Attachment "A."

Since this affidavit is being submitted for limited purpose of enabling a judicial determination of whether probable cause exists to justify the issuance of a search warrant for the described premises, I have not included each and every fact known concerning this investigation to me and others involved in this matter. I have set forth only the facts that I believe are

essential to establish the necessary foundation for a search warrant ordering the search of the described premises.

FURTHER THE AFFIANT SAITH NOT

DOUGLAS G. RYAN, Special Agent
United States Dept. of Agriculture,
U.S. Forest Service

Subscribed and sworn to before me
this 7th day of December, 1999.

JAMES H. PAYNE
UNITED STATES MAGISTRATE JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. CR-00-59-S
December 11, 2000
Muskogee, Oklahoma

UNITED STATES OF AMERICA,

Plaintiff,

vs

RICKY W. BRANTLEY and CINDY BRANTLEY,

Defendants.

HEARING ON MOTION TO SUPPRESS
AND PENDING MOTIONS

Before
THE HON. FRANK H. SEAY, U.S. *District Judge*.

Appearances:

For The U.S.A.

MR. DENNIS A. FRIES
Assistant U.S. Attorney
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For The Defendant
Ricky W. Brantley:

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For Defendant
Cindy Brantley:

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(For Ricky W. Brantley)	*Direct*	*Cross*	*Redirect*
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[3] PROCEEDINGS

December 11, 2000

THE COURT: All right. This is the Government versus Ricky Brantley, a hearing on a variety of motions.

I see Mr. Fries here for the Government. Are you ready, Mr. Fries?

MR. FRIES: Yes, Your Honor.

THE COURT: Okay. And I see the defendant here and his lawyer Donn Baker here.

MR. BAKER: Yes, Your Honor.

THE COURT: And also his co-defendant and her lawyer are here.

You might tell me what your purpose of being here is.

MS. BICKLE: Your Honor, I filed a notice to the Court advising of my desire to be present and listening to these proceedings.

It came to my attention following the entry of the plea and the selection of the jury on December the 4th that Agent Ryan, who had previously filed a written report in furtherance of his investigation has indicated in that report that there had been a malfunction with the non-manned surveillance system, showing that they were not able to obtain video tape of the December [4] harvest, which they allege was a full harvest of the area where the marijuana was grown.

I took that report, maybe erroneously, on its face and took the word "malfunction" to mean what it means in the dictionary, that it broke or it didn't work, that there was no tape that existed.

Following the entry of any client's plea and Mr. Baker's selection of jury, he was with Government Agent over at U.S. Attorney's Office and it was told that the tape had not malfunctioned but that it had been erased or taped over or lost.

The Agent Ryan had previously stated that they may have used the wrong word when they used "malfunction", and tried to explain something about the monitoring system being in two different places, not tripping the sensor.

It was after—

THE COURT: Well, let's shorten this.

You want to see if you want to continue your plea of guilty or you might—

MS. BICKLE: Yes, that's what I advised in my filing.

THE COURT: —might want to withdraw it or something? Okay.

Are you ready, Mr. Baker?

[5] MR. BAKER: Yes, Your Honor.

THE COURT: All right. I want you all to use the podium if you will, I'm still having quite a lot of difficulty with my hearing because of this cold. So I want you to always use the podium, if you will, please. First we have this motion to have the Court examine the file in-camera.

And from what the Government files in their response, they don't have any objection.

Do you have the file here?

MR. FRIES: No, we do not, Your Honor, for the reason Mr. Baker in his request asked for all the exhibits and everything we have. There are considerable exhibits and articles and items of evidence that I still have in my office. If the Court wishes to view them, we can bring them over immediately after this hearing.

THE COURT: All right. I want you to do that. Okay. So let's move on to the motion to suppress and the motion to dismiss.

And, Mr. Baker, there's no need to rehash what you've filed. I'm prepared to hear any evidence you might have or any other argument.

In either case, I still want you to use to podium.

MR. BAKER: Your Honor, first I would like to call Agent Ryan to the stand.

[6] THE COURT: Ryan who?

MR. BAKER: Agent Doug Ryan, I believe is his name.

THE COURT: Is it this gentleman right here?

MR. BAKER: Yes.

THE COURT: Okay. Come up, please. Raise your right hand to be sworn to tell the truth.

DOUGLAS RYAN

a witness, being first duly sworn, testified on his oath as follows, to wit:

MR. BAKER: Also, Your Honor, I would like to call for the rule of sequestration.

THE COURT: It's called for, in effect.

MR. BAKER: And I probably will call Agent Alford, I believe is his name.

THE COURT: All right. He can be excused.

DIRECT EXAMINATION

BY MR. BAKER

Q. State your name, please?
A. Douglas Ryan, R-Y-A-N.
Q. Profession or occupation?

A. I'm employed with the United States Forrest Service as a special agent.

Q. And you, in relationship to the Brantley investigation, prepared a report of investigation; did [7] you not?

A. Yes.

Q. On page 3 of that investigation, in the discovery it's referred to as page Bates number 3.

Did you in that report indicate that on December the 6th of 1999, you and Alford again checked the marijuana patch for further activity, and observed that all the plants had been harvested.

The surveillance system did not record the harvesting due to a malfunction, but indications were that the harvest occurred sometime between 12-1 of '99, and 12-4 of '99. Is that what you put in the report?

A. That's correct.

Q. That is not a true statement now; is it?

A. This statement still is true.

Q. So this equipment malfunctioned?

A. It may have been a poor choice of words. The equipment didn't work as we intended it to work.

Q. Would it be a fair statement that when we were here picking a jury, that in a conversation here at the courthouse that I had with you when we were questioning about this malfunction, and I had told the Court that I wanted a continuance because I wanted to look at the equipment, that I wanted to see—my experts to look at it to see how it could malfunction, that at that point [8] you changed from malfunction to telling us that what had occurred was that it just wasn't tripped, and that the sensors didn't trip and so there wasn't anything—the tape never came on because there was no tripping of the sensor?

A. Are you referring to the conversation we had right over there.

Q. Somewhere in this area.
A. Okay. Those aren't my exact words, but I did tell you that malfunction was probably a poor choice of words.
Q. But you also indicated that the sensor didn't work, that it didn't trip?
A. The sensor might have worked, but they were in two different locations. The sensor still might have turned the camera system on, but the field of view of the camera was in a different location than the sensor.
Q. Did you ever tell me that there was any tape that existed for the December—the month of December when this was harvested?
A. You never asked me until we went to the U.S. Attorney's Office later that day.
Q. And when I went to the U. S. Attorney's Office and was looking, and kept saying I want to see the video of December, with the month of December, what did you tell me?
[9] A. I told you that that videotape was either back in service or that it just wasn't—there was nothing of evidentiary value of the tape, and I told you I put it back in service.
Q. So can establish that, in fact, there was a tape, that the camera did come on and it did document some things, but in your opinion they were of no evidentiary value?
A. That is correct.
Q. And so you took it upon yourself to destroy it. Was it destroyed?
A. No, it wasn't destroyed.
Q. Was it erased?
A. It was either erased or placed back in service. And the actual running of the camera would erase it as it taped over the top of it.
Q. So that tape does not exist?
A. Oh, it probably exists. It's out there somewhere.

Q. Okay.

A. But I didn't destroy it. I would only destroy a tape or actually throw a tape away if there was evidence on the tape that looked like the tape is damaged to the point where I didn't want to use it or it was extremely dirty or something of that nature. Then I would discard the tape.

[10]

Q. Well, when I asked you about why you would tape over it or use it again, you told me that it costs eighteen dollars?

A. They run anywhere, depending upon how many tapes you buy at the particular time, anywhere from ten to twenty dollars.

Q. And that was your reason, was because this ten or twenty dollars, you didn't want to waste the Government's money, so reuse this thing?

A. Well, our budget is limited. And we have numerous surveillances going on at one time.

Q. As I understand, part of the issue in this case is—and you tell me if that's the way you understand it—the cut off here is under fifty or over fifty plants. You understand that is a significant number; correct?

A. The plants are counted.

Q. Okay.

A. We have had prosecutors that prosecuted cases well under fifty plants.

Q. And I didn't ask that.

My question was, you understand under the statute that the punishment differs some, that if it's under fifty plants, if it's over fifty plants, that the number of plants in this trial is going to be an issue?

[11]

A. I understand that, yes.

Q. Do you have any evidence that will show us a photograph of 53 plants that you all claim exists?

A. We have photographs, but it doesn't take a picture of all 53 at the same time.

Q. On this tape that was erased or reused, whatever term we're going to use, did it show some marijuana plants?

A. Yes.

Q. And so the number that we could se in December to actually be able to see the marijuana plants, that man erased or taped over?

A. The camera field of view was more so in the middle of the marijuana patch. So it didn't show all the plants, no, just a few of them.

Q. But it showed some?

A. It did show some, yes.

Q. In looking at the photographs I have, it appears that there was a lot of the marijuana in August, and then in November when you say my client was the one in the patch, it doesn't appear to have very many marijuana plants at all. Is that a fair statement?

A. I would have to look at each individual photograph you're referring to.

Q. Okay.

[12] MR. BAKER: May I—

THE COURT: You're not familiar with the evidence?

THE WITNESS: I beg your pardon?

THE COURT: It's your evidence; isn't it?

THE WITNESS: Yes.

THE COURT: And you're not familiar with it?

THE WITNESS: Yes, I'm familiar with my evidence. But there are numerous photographs that I took.

THE COURT: Well, are you familiar with all of them?

THE WITNESS: Yes.

THE COURT: A guy ought to be, you know, if you're the one who's up here to kind of lead prosecution,

lead the evidence. You ought to be familiar with the evidence.

Maybe nobody has ever taught you that.

Did the Government tell you to review your evidence?

THE WITNESS: Yes.

THE COURT: Did the Government lawyer tell you that, to review it?

THE WITNESS: Yes.

THE COURT: You knew that anyway, though; didn't you?

[13] THE WITNESS: Yes.

THE COURT: Okay.

MR. BAKER: Your Honor, may I approach the clerk to have marked some laser photographs that I have?

THE COURT: Where do you have them?

MR. BAKER: At my desk.

THE COURT: Bring them up, all of your proposed exhibits at one time so you don't have to be walking back and forth.

(COURT AT EASE)

BY MR. BAKER

Q. Let me hand you what has been marked as Defendant's Exhibits 1 through 5.

In looking at Number 1, do you recognize that?

A. Yes.

Q. And is that a photograph of the marijuana patch as it existed in August of '99?

A. Two of them are. Two of them in Exhibit 1 are from August the 24th. And one of them is from—

THE COURT: I haven't seen them, so I don't know how they're marked. Are they marked on the back?

THE WITNESS: They are bate stamped—
THE COURT: Oh, I see. I see here on the front. Yes, I see.
And there are three on that first page. I didn't **[14]** understand that. All right.

A. They're date stamped. And two of them appear to be from 8-24, and one of them appears to be from 10-28.
Q. So one of them—two of them are in August and one of them in October?
A. Right.
Q. Now, were these still photographs that you all took?
A. Yes.
Q. So it didn't come off the video camera?
A. That is correct.
Q. Did you do this every time you would go?
A. No.
Q. Well, you took photographs in August. We can see there.
A. That was the first time we were there.
Q. Okay. And you took some in October?
A. Yes.
Q. Then let's look at Exhibit Number 2. When were those photographs taken?
A. November 22nd.
Q. Now, was that before or after you indicate that my client had been in the patch?
A. After.
Q. Are these video or were they taken with a camera?
A. Still camera.
[15]
Q. Would you agree that the photographs in November show fewer plants than what we observed in August and October?
A. Yes.

Q. Is there any particular reason why?
A. They are not taken from the exact same position, I know that much. And there was a partial harvest of some plants on November 3rd.
Q. Okay. Well, now, the Judge can see that in the video. When you call it a partial harvest, that's another thing I want to get to. In your report you said they pruned the buds?
A. Yes.
Q. Would it be a fair statement that actually what the video shows is that someone reached down and cut the plant and tossed it to the side?
A. I believe in my report I state both, I think, that they prune the buds and also pruned some individual plants.
Q. Okay. There isn't anything on the video that shows anything about pruning buds; is there?
A. No, just cutting two plants.
Q. Okay. So where is it that you came up with this pruning the buds if it wasn't on the video and you weren't there? How did you determine that?

[16]

A By looking at some of the other plants.
Q. Did you photograph those so that we could see?
A. Yes.
Q. And which one?
A. Exhibit 2, one of the photographs from 11-22, you can see two plants there in the left-hand side of the picture that appear to have been cut all the way up the stalk with some type of instrument to remove the actual stems.
Q. And do you have any idea who did that? Any evidence?
A. Just the evidence that appears on the videotape.
Q. Exhibit Number 3, were those photographs that you took?
A. Yes.
Q. And when were they taken?

A. There's three photographs on this sheet. Two of them are date stamped 11-22. And one of them is date stamped, but due to the vegetation in the way I can't tell exactly what date it is.

I would say that that photograph was also taken 11-22.

Q. Look at Exhibit Number 4.

Were these photographs taken by you?

THE COURT: Mr. Fries, if you have any objection to any of these exhibits—he's not asking **[17]** they be admitted in evidence. If you have objection to any of them you tell me, and I'll inquire about it.

MR. FRIES: I do not, Your Honor. I assume Mr. Baker will move to introduce these. And we're familiar with these exhibits. We have no objection to them.

THE COURT: All right.

MR. BAKER: I would move to introduce 1 through 5, Your Honor.

THE COURT: Okay. All I've got is 1, 2 and 4 identified so far. You're starting to talk about 4.

BY MR. BAKER

Q. You said Exhibit Number 3 was photographs of the patch taken 11-22?

A. Yes.

Q. Now, look at Number 4.

When was that taken?

A. Eleven twenty-two, also. There's two photographs. One is date stamped 11-22. And the other one, I think the date stamp, I think I can tell, is 11-22, probably taken the same day.

Q. Do you have any photographs in December?

A. Yes, we took photographs in December.

Q. Where are those photographs that were taken in December?

[18]

A. They are not in my possession.

Q. Well, who did you give them to?

A. I submitted them to the U. S. Attorney's Office.

Q. Okay. I have all the photographs that I was given. You're saying that there are photographs that show the marijuana patch in the month of December?

A. Yes, I took some in December.

MR. FRIES: Your Honor, I think I can clear this up.

I was given the December photographs, I believe, this past Sunday. When I got them, I tried to call Mr. Baker earlier last week to inform him that we had these December pictures that I had not had before. And we have them. They're available to Mr. Baker, if he wants to see them.

THE COURT: They're available now, you mean?

MR. FRIES: Yes, Your Honor.

THE COURT: I mean, they haven't been up to now. He wouldn't know about it. That's my guess.

I mean, we were all here together a week ago today sitting right here in this courtroom. If you tried to call him the day before, did you tell him Monday when we were, "Oh, by the way, I've got some photographs I didn't give you. You know, we're not going to trial for a week, but you're getting them a week prior to trial, **[19]** and here they are?"

MR. FRIES: No, Your Honor.

MR. BAKER: As I understand it, it was this Sunday you got them.

THE COURT: No, he meant a week ago.

MR. FRIES: A week ago. Not yesterday. A week ago.
THE COURT: Where are they, Mr. Fries?
MR. FRIES: They're back in my office, Your Honor.
THE COURT: You need a recess for him to get them so we can continues with this?
MR. BAKER: Yes, Your Honor.
THE COURT: We'll recess until Mr. Fries gets all his evidence up here.

Bring all your file while you bring it.

(COURT RECESSED)

(AFTER RECESS)

THE COURT: Show the defendant and his lawyer here and the Government here.

Mr. Fries, did you turn over that stuff.
MR. FRIES: I did, Your Honor.
THE COURT: What did you turn over?
MR. FRIES: I have given to Mr. Baker the seven photographs. The other things that are part of my **[20]** file are here.
THE COURT: How many photographs did you give him?
MR. FRIES: I didn't count them, Your Honor.
MR. BAKER: Six, Your Honor.
THE COURT: Anything else out of negligent or deceit that you failed to turn over to the defendant?
MR. FRIES: No, Your Honor.
THE COURT: I mean that you're supposed to.
MR. FRIES: No, Your Honor.
THE COURT: And where is your file?
MR. FRIES: Part of the file is here, Your Honor. And here is our actual case file. There are things that were part of our file I have taken out for the purposes of trial use.

The only things that, Your Honor, that I want to bring to the Court's attention, within these two files are investigator's—there are or have been other cases going on regarding this defendant. And we have not turned these over.

We provided them to the Court in order for the Court to see if they are relevant in this case, but they do involve the defendant, but they have no relation to this case. **[21]** The Court: But you say you've given me all the files, including those that you were talking about just now. The only thing is you haven't—that's not 'something you have given Mr. Baker, is that right, but you're giving them to me?

MR. FRIES: That's correct, Your Honor.

THE COURT: Put them up here. Bring all that stuff and put it up here, right on the floor or someplace up here. I don't want it now. Yeah, put it down there somewhere.

Okay. Go ahead, Mr. Baker.

DIRECT EXAMINATION CONTINUED

BY MR. BAKER

Q. Agent Ryan, up on the monitor is Exhibit Number 1. And, as I understand it, this right in here is the marijuana that you're photographing; is that correct?

A. It's out of focus; but, yes, that appears to be marijuana. Yes.

I don't know if you can get it in focus.

It's clear on the individual photograph, what you showed me earlier. But that's okay, I can see it. It appears to be marijuana.

Q. All right. And that was done on 8-24; correct?

A. Yes.

Q. And then when we move to Exhibit Number 2, this is [22] marijuana of 11-22; is that correct?

A. Yes.

Q. And, again here, this is an 11-22, in November. And it's just this piece right there that we're talking about, that you photographed?

A. From looking at that I can't tell. There might be some other marijuana in there has been removed from the stalk. But the green plant that's in the center is marijuana, yes.

Q. As we move on to Number 3—and, again, this was in—this 11-22; correct?

And I take it this is what you're calling the marijuana?

A. I can't tell the date on that, but maybe you can see it better where you're at.

Q. Now can you see it?

A. Yes.

Q. Okay.

A. Eleven twenty-two.

Q. All right. And then down below, that photograph, this, too, is a 11-22; correct?

A. Yes.

Q. And that's what you're photographing?

A. I'm photographing the scene. There is green marijuana there, but there might also be some marijuana [23] that was removed from the stalk and the stalk is just there. But I can't tell from looking at it up on the big screen.

Q. I want to now show you what has been marked and I've just received as Exhibits Number 6.

Now, this is what you say was—you photographed this in December?

A. Can I look at that individual photograph? I can't see it on the screen very well.

THE COURT: Bring it up to him.

Q. Let me see if the zoom will help. Does this one help?
A. Not really.

THE COURT: Bring all of them that you're going to use, the photographs there. Let him look at them. Then you can go back.

A. No, see, I couldn't see that date stamp.

THE COURT: There's no question.

Q. Now that you've had an opportunity to view it, let me put on here Exhibit Number 11.
And do you recognize that?
A. Yes.
Q. And you correct me if I'm wrong, but we're talking—what you're photographing is this right here; is that correct?

[24]

A. That's one of the things that's in the picture.
Q. Well, that's the plant that you say is marijuana?
A. Yes. That is a marijuana stalk that had been cutoff.
Q. Okay. And you took that on 12-6?
A. Yes.
Q. You indicated in your report that the harvest in December was the same, or similar, to the one in November?
A. Yes.
Q. Well, correct me if I'm wrong, but it appears somebody has striped the leaves off of that.
A. Well, there's several photographs that have been taken that day. Some depicted stalks that were cut off near the ground. Some depicted stalks that were pruned up along the main trunk and just the branches taken off. So there's a variety of photographs there, and a variety of photographs that depict the—
Q. We're going to look—

A. —different techniques.
Q. We're going to look at all of them. But my question is, is you told that—the Grand Jury and in your report, you have indicated that the harvest in December was similar to the one that the defendant did in November.
A. That's correct.
[25]
Q. My question to you is, is what you see on the video that was done in November, he didn't strip the leaves off like in this photograph; did he?
A. No. That marijuana stalk there appears to be cut about—the main stalk appears to be cut about halfway up.
Q. Okay. Let's look at one that's not. Let's look at Number 8. Now, in this one, is that what we're looking at?
A. Yes.
Q. The leaves are not on there but it's still—the stalk or whatever, plant, is still in the ground?
A. It was pruned near the stalk, yes.
Q. But it's still in the ground?
A. Yes.
Q. The two that you observed him, if it was, in fact, the defendant in November, those were taken completely out of the ground; were they not?
A. When he was depicted on the video tape?
Q. Uh-huh.
A. Those plants that were in the camera field of view, they were taken by cutting them off at the—near the ground level.
Q. Is this one of the 53 plants that you're saying was harvested?
[26]
A. Yes.
Q. And these photographs, did I understand correctly that you just gave these to Mr. Fries last week, right before the trial?

A. I gave him the photographs I had at that time just as he depicted, yes. He didn't—they were in my file and he asked me about if I had photographs of December the 6th. And I was able to produce them.
Q. Why had they not be been produced earlier?
A. I thought they were.
Q. So I guess your testimony would be that, as far as you know, you had produced them, and what they did with them you don't know?
A. As far as I know, I thought I had produced them. He didn't have them in his file. I produced another copy.
Q. And is the only ones missing these from December?
A. As far as I know, yes.
Q. And when did you turn those over to him?
A. I think it was Sunday, a week ago, I believe.
Q. Was there any effort Monday when we picked the jury to give me those photographs?
A. Not on my part.
Q. Well, you were up there with Mr. Fries and the rest of us when I was looking at the video. And you did get the impression from my being there that I was very **[27]** interested in December, that I wanted to see something that dealt with the harvest in December; would that be a fair statement?
A. You told me that the last thing just prior to you leaving, yes.
Q. That that's what I wanted to see. And did anybody jump up and say, "Oh, wait a minute. I've got some photographs from December that you might want to see"?
A. No.
Q. When was it that you say you erased off this tape that dealt with December?
A. Our normal operating procedure is to, if we're going to utilize a tape back in the field at that particular camera

system at that particular location, a lot of times it will be rewound and just used over again.

That particular tape was removed with the system that day. Everything was removed from that marijuana patch. Came back to my office. The tape was either erased at a later time or placed back in service on another surveillance after I viewed it again to make sure that there was nothing on it.

Q. Okay. Now, when you say "nothing on it", there was something on it, you just had made a decision that it wasn't of any evidentiary value?

A. That is correct.

[28]

Q. But there was evidence. I mean, it showed marijuana, and there was stuff on there?

A. Just like there was on, you know, ten other tapes when we were there.

Q. Okay.

A. Yes.

Q. And I take it that all those tapes are gone?

A. They've either be reused, yes, or used at the same surveillance operation.

Q. How many tapes would you say exist—in reading your report, it appears that—for one place in there you indicated that you went in the patch on several occasions between when it was first located in July; is that correct?

A. Yes. It was located July 27th.

Q. Okay.

A. We didn't ground check it up until the 24th of August.

Q. So, August, September, October, November, how many times would you say you were in there?

A. We were in there a total, between—including 8-24, and including the last time we were there, we were there eleven times.

Q. And was there a tape each of those eleven times that existed?

[29]

A. Yes.

Q. And we've now, out of those eleven tapes, we're down to one tape that still exists?

A. Well, those tapes probably exist somewhere, but we have one tape that had a person on it.

Q. When you say they exist, whatever was on the tape has either been erased, taped over, lost, destroyed, whatever. We can't go look at those eleven tapes and see what you saw.

A. That's correct.

Q. And out of those eleven tapes there's only one of them, the one you all chose to—that you thought was of evidentiary value, that's the only would be you all kept?

A. The only would be that had someone on it, yes.

Q. Okay. There was a—was there an eight month delay from the time you all observed the marijuana and got your search warrant and went in on his property, was there about an eight month delay before the indictment?

A. No.

Q. Well, when was the indictment?

A. I'm not sure of the exact date of the indictment. It was after the search warrant. The search warrant was December. The search warrant was December 13th. The indictment came later. And I'm not sure of the exact **[30]** date.

MR. BAKER: May I go to my desk, Your Honor?

THE COURT: Yes.

(PAUSE)

Q. The search warrant was December; correct?

A. Correct. December 13th.

Q. Okay. And the indictment is September of 2000. So, nine months. I said eight, but it's nine months from the time you got all this evidence until there was an indictment.
A. Okay.
Q. When, in that period of time, were these tapes determined not to be of any value and reused, destroyed or whatever?
A. They were determined not to be of any value or reused soon after I viewed them in the marijuana patch.
Q. Okay. And can you explain the delay, the nine months?
A. For the indictment?
Q. Uh-huh.
A. No, I cannot.
Q. Well—
A. That's not controlled buy myself. I don't—I submit the report.
Q. Well, you were around. And do you know whether or **[31]** not there was negotiations going on about taking his hundred and sixty acres?
A. Yes, there was some talk. It wasn't with me, though.
Q. Okay. And was it your understanding, like Ms. Brantley, if they gave up their land that she wouldn't even be indicted?
A. No, I don't know of any such conversations.
Q. So you don't know what the deal was?
A. No, I do not.
Q. Looking at your report, and everything, you indicate that as a federal officer that you have investigative duties on—there's a national forest down there; is that correct?
A. That's correct.
Q. And your authority is on U. S. land, is that correct, government land?
A. Our authority is on government land and extends off of government land if—
Q. If what?

A. If it is—shows some type of nexus to government land, affects government land, affects any of its users.
Q. Okay.
A. And also with Title 21 authority given to us through the DEA, with their concurrence we work anything that is outside the proclamation boundary that is close to **[32]** national forest land.
Q. Well, this didn't have a nexus to the national forest; did it?
A. It was, I guess, probably about maybe two miles from the national forest.
Q. And it was on Weyerhaeuser land?
A. It's on Weyerhaeuser property, yes.
Q. Well, what was the nexus to you all?
A. Well, roads come and go through the national forest from that location. Plus Weyerhaeuser is cooperating agency, so to speak, with the forest service.
Q. Did you all want his land?
A. Did we want his land?
Q. Uh-huh.
A. The land was considered for forfeiture, yes.
Q. Okay. But even before that, did you want his land?
A. I didn't even know that that—personally I did not know that, no. I was later told—
Q. Did you have a conversation with my client wherein you told him that you had a video of him in December harvesting the marijuana?
A. No.
Q. You don't recall having a conversation with him where you told him you had him on tape?
A. I recall a conversation I told him, yes, I had him **[33]** on—or I knew that he was in the marijuana patch.
Q. And did he tell you that he wants to see it, that if you're claiming that he harvested 53 marijuana plants you need to show him that tape, that he won't be on it?

A. No, I don't recall that.
Q. You don't have any recollection of that?
A. No.
Q. You indicated in one of your reports, or in your testimony at the detention hearing, that the marijuana plants that appeared to be well taken care of. You told the Grand Jury and then Judge Payne that these were 53 marijuana plants that appeared to be well taken care of.
A. Yes.
Q. Let me show you Exhibit 4.

And tell me what it is that would cause you to say that this 11-22 of '98—of '99, appears to be well taken care of?

A. At this time of the year, late in the season, for a plant to reach that maturity and that condition, it would take considerable amount of tending to. In other words, to have it reach that point. Once it reaches a point that it's not so susceptible to insects and to drought, and various things, as a younger plant would be, then basically you're just waiting for the plant to mature itself. And the production of the plant is **[34]** reduced. So for it to reach this stage, it had to have been. Plus, the ground was, you know, all exposed around the plants. It had to have been intended to in order to reach that stage.
Q. So in order to reach that stage they had to tend to it every day, every other day, once a week?
A. Not that often, depending upon—
Q. Well, how often?
A. Well, it depends upon a lot of variables, if you've had rain, if you've had insects that are damaging—
Q. This year when you told the Grand Jury it was well taken care of, the truth of the matter is, is that from the time you all put your camera in there, from August, September, October, nobody—you saw nobody in there?

A. That's correct.
Q. But yet you tell people it was well taken care of?
A. That is because of the stage at which the plant . . .
Q. You tell people that it was well taken care of.
A. That's correct.
Q. And you base that upon because it just couldn't have got this big unless somebody was doing it?
A. Similar to your garden. If you pay attention to it when it's small, you keep the weeds out, et cetera, and once it reaches a certain maturity you can kind of slack off on the attendance to the site.

[35]

Q. I notice in your investigation that you had a—on the search warrant a log where you all were meticulous and lodged everything and where you found it and everything; correct?
A. Yes.
Q. Any particular reason why we weren't this meticulous in the plant itself? I mean he's charged with manufacturing marijuana. Why is it we don't have a photograph log of the photographs you took in the marijuana plant—field?
A. Well, they're date stamped. I'm not too sure I need a log. I took all the photographs, so I don't think—
Q. But you didn't take photographs of 53 marijuana plants?
A. I did not take individual photographs of 53 plants, no.
Q. And we don't have—like if it goes to a jury trial and one of the things that you all have to prove is that, in fact, there was 53 plants, how do you plan on proving that?
A. I personally counted them and so did some other officers.
Q. So we'll have to rely on what you all say, because there isn't any other visual evidence?
A. There's not individual photographs of each plant due **[36]** to the fact that we have to be careful about leaving sign on

the patch, and we can't go to each individual plant and take the photograph.

Q. You took samples from this marijuana; correct?
A. Samples were taken, yes.
Q. Have they been destroyed also?
A. No.
Q. So the samples still exist?
A. Yes.
Q. And where are they?
A. They are either at the crime lab or they've been returned to the officer who submitted the samples.
Q. Okay. Now, there are photographs that when you all conducted your search there was some barrels that had this marijuana in it?
A. Yes.
Q. And I take it that your all's position is that this marijuana that was found in this trailer is the same marijuana that came from this field?
A. Yes.
Q. Does that exist where we can have it tested to determine whether or not it's three years old, four years old, it's age, and have tests done on it?
A. The marijuana does exist. It's in evidence storage. But as far as determining age, I'm not too sure that's [37] possible.
Q. So none of the drug have been destroyed?
A. No.

MR. BAKER: Your Honor, I would move to have introduced into evidence 6 through 11.
THE COURT: Any objection?
MR. FRIES: No objection, Your Honor.
THE COURT: Show them admitted.
MR. BAKER: I don't have any other questions at this time.

THE COURT: Any questions, Mr. Fries?
MR. FRIES: Just briefly, Your Honor.

CROSS EXAMINATION

BY MR. FRIES

Q. Agent Ryan, when you go to investigate a patch, you set up a—there would be occasion where you set up a surveillance camera, basically?
A. Yes.
Q. And how do you go about doing that? What is your procedure when you do that?
A. We have to determine once—number one, if in fact that it would be beneficial for us to spend the time and effort to set up a surveillance camera.
And number two, then to establish the fact that—well, is there a place where we could sat it up without **[38]** it being seen.
Q. Have you had any experience and training in how to determine how these cameras should be set up and what positions?
A. Yes, I have.
Q. And could you describe to the Court the training that you received in that regard?
A. I initially received technical equipment investigative training approximately eight years ago at the Federal Law Enforcement Training Center. And then every year thereafter I've completed seminars put on by the National Technical Association of Investigators, and individual training sessions by manufactures that produce this surveillance equipment.
Q. And in the particular office where you work out of, are you the technical equipment investigator?
A. Yes, I am.

Q. How many of those are there throughout the country in the forest service?

A. There's one for each region, approximately eight other technical agents in the United States.

Q. And you are the agent who is in charge of that for this particular region?

A. For the southeastern region, yes.

Q. After you set a surveillance camera up, what do you **[39]** do—what is your normal process in the way of tending to that camera or servicing that camera?

A. We try to get back to the camera system for battery life consideration anywhere from seven to fourteen, twenty-one days, depending upon when we can get back to it.

Q. And describe to the Court what you do when you go about resetting or servicing a camera system?

A. We initially, when we enter the area, sometimes we can't get too close to it because of leaving signs. Sometimes we can get closer than others. We look at the overall on the ground scene and determine from visual if, in fact, there's been any activity that we can detect.

We then go to the camera system, and if the tape itself—I pull the tape out of the unit. If there's been a lot of tape taken, I will replace the tape with one out of my bag, and it could be a new tape or it could be one that was erased before, from a different surveillance. Put in it there. And then that tape then is taken back to my office to be viewed on a larger screen, on a larger monitor, to make sure that that confirms that there was no activity, or perhaps there was.

Q. Did you review each and every tape while you're **[40]** servicing the camera system?

A. Sometimes I do; sometime I don't, depending up the amount of tape that was taken. To conserve battery life while I'm out there, I may not rewind a whole tape and

view the whole tape out there. I would replace it and then view it back at the office. Sometimes if there's not too much tape taken, I will rewind it, view it in the field, and then reset it with the same tape.

Q. But, in any event, you will review each and every tape, whether that review is conducted in the field or back at your office?

A. That's correct.

Q. And what do you look for when you're reviewing these tapes?

A. I basically look for any activity created by any human being.

Q. And when do you make the decision that you will just rewind the tape or put it back into service for another unit?

A. Whenever I view it and there's nothing on there that depicts anybody in the marijuana patch.

Q. And that is either down in the field or when you go back to your office?

A. That's correct.

Q. And, in this particular case, you've testified that **[41]** you service a camera on eleven different occasions but there's only one tape?

A. Yes.

Q. Did you review those other ten tapes?

A. Yes, I did.

Q. And did you make a determination as to whether those tapes could be kept or could be put back into service?

A. Yes.

Q. And what was that decision you made, and why did you make that decision?

A. The decision was to keep one tape as evidence—

Q. Let's focus on that. Let me stop you there. I apologize, Agent Ryan.

Why did you decide to keep that one particular tape, keep that as evidence?

A. Because it had a human being recorded on the tape in the marijuana patch.
Q. And was that the only tape that had showed a video recording of any individual in the marijuana patch?
A. That's correct.
Q. Did any of the other tapes contain any human being in the marijuana patch?
A. No.
Q. And, again, let me—continuing your answer, tell us how you—why you made the decision to keep those [42] other—put those other ten tapes back into service?
A. Mainly because of budget constraints on tape. When we have numerous surveillance going at one time, you know, we have a limited number of tapes, and they're just put back in service.
Q. And is that part of your normal procedure that you use with the forest service?
A. Yes.

MR. FRIES: I have no further questions, Your Honor.
THE COURT: Any questions?
MS. SICKLE: Your Honor, may I be allowed to ask questions?
THE COURT: Yes.

CROSS EXAMINATION

BY MS. SICKLE

Q. Agent Ryan, you've testified that you're determination of what was and was not of evidentiary value, you relied exclusively on whether or not a human being was observed in the tape; is that correct?
A. Yes.
Q. And it's fair to say that in this case a period of approximately four months went by during the time that you sur-

veilled the field, and you have less than thirty seconds of tape that include a human being; is that **[43]** correct?

A. Actually it's fifty-seven seconds.

Q. Fifty-seven seconds?

A. Yes.

Q. And does the absence of a human being in a field have any merit to you at all? Does that cause anything to come into question?

A. If there wasn't any activity out there, if there was an absence of someone on the tape, is that what you're asking me?

Q. That's it.

A. There are times when the system does not function properly.

Q. I'm not asking you about how the system functions. I'm asking you as a well experienced, well trained, seasoned officer if you have four months of surveillance and fifty-seven seconds of a person, does the absence of human beings being seen in your video tape have any evidentiary value to you?

A. Just that if I can't see that there's something been done on the marijuana patch, the absence of that, plus no video, tells me that there was probably nobody there. Q. How many hours of videotape do you think you reviewed in the course of this surveillance?

A. Let me do some figuring here.

[44]

Probably during that whole time period, probably a total of two or three hours worth.

Q. Were there any periods of time between August the 24th and December the 13th, 1999, that there would have been no tape being used in the surveillance system due to the batteries going down or failure for you to place a tape back into the surveillance system?

A. There was always a tape placed in there.

Batteries do go down. I can't remember, being that we checked it that often, that at any time we didn't have battery life.

Q. Is there some log where you've documented each and every time you've been to that particular marijuana patch?

A. I place it on my calendar, that's all.

Q. So you did not generate any kind of written report that would document your activities there in the field?

A. No.

Q. Did you produce a photograph log from any of the still photographs that you took in the four months that you were involved in this surveillance?

A. No.

Q. Did you prepare rough notes prior to preparing your final report?

A. No.

[45]

Q. So, as I understand it, your report—you have it with you?

A. Yes.

Q. It's dated January the 5th, 2000; is that correct?

A. Yes.

Q. Is it your testimony today that you didn't have any rough notes, you didn't have a log, you didn't have a photograph log, you only had a calendar. And you developed this multi-page report exclusively from your memory on January the 5th, 2000, of your activities for the past four months?

A. Yes.

Q. Were you conducting any other investigations during that four months?

A. Yes, I was.

Q. What caused you to remember that it was July the 27th, 1999, when you were initially called to the field, or notified of the presence of this marijuana patch?

A. It was in the initial preliminary report.
Q. What initial preliminary report?
A. That was supplied to me by the case management officer, agent.
Q. And who is that?
A. Rex Woodson.
Q. And do we have a report that has been submitted to **[46]** us from Rex Woodson?
A. It was part of the attachment to my report, called a preliminary investigative report.
Q. I show a preliminary investigation report dated August 31st, 1999, over the signature of Gary Rose that shows drug detection flights. And you're reflecting something from a Mr. Woodson?
A. That is initially sent to a reviewing agent who assigns the case, and that's where I receive it from.
Q. I'm asking have you ever supplied Mr. Woodson's report to the U. S. Attorney's Office here in the Eastern District?
A. Mr. Woodson doesn't do a report.
Q. Okay. So you did not rely on a written report, then, by Mr. Woodson in formulating your dates?
A. Right.
Q. When you began your surveillance, were you looking for a known suspect?
A. Looking for any suspect.
Q. Okay. Did you have a known suspect in mind during the surveillance?
A. No, I did not.
Q. Is it your testimony today that the name of Ricky Brantley never surfaced in that four months prior to seeing him in the video tape?
[47]
A. No.
Q. Or who you alleged to be him?

A. No. It did because we researched whose land was close to that particular marijuana patch.
Q. And during that period of time had you researched anything about his past record?
A. I probably did, yes.
Q. Did you know there was a drug conviction out of Arkansas for 1984 on he and his wife?
A. I did not know that.
Q. When did you became aware of that?
A. Probably prior to the execution of the search warrant.
Q. So, to make a long story short, you did know you were looking for activity from Rick or Susan Brantley during this four month period of time; is that correct?
A. I knew I was looking for activity from someone.
Q. Well, I'm not trying to banter words with you, or get into the mechanics, but you were considering Ricky Brantley or Cindy Brantley as a suspect; is that correct?
A. I would you consider anyone that—
Q. I'm not asking you if you considered anyone or the whole world, I'm asking you if you considered Ricky and Cindy Brantley as a suspect.

[48]

A. Not until he appeared in the video tape.
Q. Even though you discussed him and talked about him before the video tape?
A. We talked about the landowner, yes.
Q. Now, you talked about these tapes being taped over. Is it possible that you'll have a surveillance tape from another marijuana patch, that you decide is of no evidentiary value, and you put in the surveillance equipment there in this particular patch, and then as it tapes it tapes over?
A. Yes.
Q. How do you distinguish, when you review that tape, from one marijuana patch to the other?

Let's say that you put it over here in this patch you say is ours, and it doesn't tape as much as the other one. So you're going to have part of this field and part of that field on one tape. How do you distinguish?

A. The majority of the time, when I utilize it's the same tape without it being erased with a machine, it will have a very short portion in the front which is usually taped over. If it didn't reach that point, there's date and times stamps on it; plus, the actual view of the patch is totally different from—it's taken from a different place.

[49]

Q. But you can tell?

A. Well, I can tell, yes.

Q. Talking about the date and time stamp, in looking at the video that you produced to the defendants it indicates that this tape starts out at 1:26 p.m. on 11-3, and then it just immediately flashes to 1:55 p.m. Do you have any explanation for that?

A. The way that sensor works is that it's a passive infrared sensor in which any differences in temperature or movement will be detected by the sensor. And that sensor sends a transmission to the receiver, which is a totally different unit. And that sensor could be triggered from various things. It could be a warm leaf or something that blew in front of the camera. I could be a squirrel. I mean, the sensor could be a squirrel, it could be deer, it could be—there's a lot of different variables in there that the camera will be told to turn on and to turn off.

Q. Now, I listened to you with Mr. Baker. Are you saying that the fifty-two and a half pounds that you submitted to OSB came from this marijuana patch?

A. I can't tell if it exactly came from that marijuana patch, but the plants that were hanging in the rusty trailer appeared to be, you know, the same age, maturity, that the plants that were removed from that **[50]** marijuana patch.

Q. How much training have you had with regard to how much a particular plant will yield, from the appearance of the plant?

A. Over the year in investigating hundreds of marijuana patches, I've seen marijuana at different stages, and produced different amounts of marijuana.

As far as my formal training in drugs came from DEA. It came from the Federal Law Enforcement Training Center.

Q. I don't mean to cut you off, but let me ask just a simple question. Is it your testimony today that the patch that you observed in surveillance for four months had the potential of yielding fifty-two and a half pounds of processed marijuana?

A. It's possible, yes.

Q. Now, there was a sample taken on August the 24th, 1999. That's when a sample was taken from the field; is that correct?

A. I would have to check. I wasn't the one who took the sample. I believe possibly Officer Rose was.

Q. Are you aware of the fact than that sample, then, was not submitted until sometime in November of 1999?

A. They get submitted at different times, depending upon—a lot of time we wait so as not to burden a **[51]** crime lab until we actually get a suspect in the marijuana patch. Otherwise I would be sending in the lot of sample throughout the year.

Q. Are you aware of the weight of the sample that was sent in?

A. No.

Q. If I tell you it that was 1.6 grams, would that refresh your memory?

A. No. But it's a small sample.

Q. That's a very small sample; isn't it?

A. Yes. They don't require much.

We can't take a lot from the plant while it's out there, or the plants, because we don't want the grower to realize that some of the marijuana had been removed, so we're very careful on how much we take as a sample.

Q. And it's your testimony today that that sample still exists?

A. Yes.

Q. And would you agree the marijuana varies in levels of THC and chemical design, based upon where it's grown, what's used in its growing, whether it's fertilized, all those variables that can come into play can have a bearing on the level of THC that exists in a plant; is that correct?

A. That's what I'm told, yes.

[52]

Q. So it's your testimony that that 1.6 grams that's at the lab, you took from the marijuana field itself?

A. I didn't take it, but it was taken—there was a sample taken that day.

Q. Did you observe it taken?

A. Yes, I think I did.

Q. Would you expect, then, to have a finding consistent with strength and concentration with what was found at the Brantley farm?

A. No, because time plays a very important part in the concentration levels, both times plant was harvested and also a time that it sat on a shelf. THC level has a tendency to leave the plant as it—once its harvested it starts a process where it starts to leave the plant.

Q. Why couldn't you take photographs of the individual plants to indicate that there were 53 plants growing?

A. Probably due to the fact we didn't want to leave any sign on the soft ground. We didn't want to—

Q. Well, you had to see them to count them; didn't you?

A. Well, you can see them.

Q. Well, if you see them, can't you photograph?
A. I suppose you could, yes.
Q. So, then, it would be possible to have produced visual evidence of all 53 plants?
A. I guess if you could overlap photographs and make **[53]** sure that everybody photograph matched, because you get them all in one picture and see them all.
Q. Well, let me ask you this. If you were sitting in the same chair that Mr. Brantley is, wouldn't you want that kind of evidence before you went to prison. Or Ms. Brantley, before you pled guilty, wouldn't you want that kind of evidence?
A. Well, I don't know if it could be produced. You would have to—
Q. You don't know because you haven't tried; isn't that correct?
A. Well, our normal practice is to—
Q. Excuse me. The question is you don't know because you haven't tried; have you?
A. I have taken photographs of entire patches before, but they've been extremely small.
Q. Now, in this report you generated, which is about six pages of typing, is there anywhere in that written report that you provide all of this information we learned this morning, that there were pictures taken in December, that there were eleven tapes generated, that you decided to tape over them because they were of no evidentiary value? Is that contained in your report anywhere?
A. On page 3, middle of the page, the last part of the **[54]** paragraph says, "All the surveillance equipment was removed and photographs were taken by Ryan."
Q. And what day did that happen?
A. That was 12-6.

Q. Does that suggest that photographs were taken August 24th, or September, or October, or November, or December, or does that suggest to you that photographs were taken on December the 6th? What are we supposed to gain from the sentence, is what I'm asking you?
A. Well, that I took photographs that particular day.
Q. Okay. Does it say anything about getting eleven tapes?
A. At the top of the page it says from 8-24 through 12-6 we returned to the site, checked for activity, and each time resetting the surveillance system.
Q. My question to you—and I didn't ask you if you reset the surveillance system. Maybe I didn't make myself clear. Do say anything about generating eleven tapes that you viewed?
A. No.
Q. Now, would you agree with me that just because you reset the surveillance system does not necessarily suggest that you removed the tape and took it away? It could be the same tape, for all we know. Wouldn't that **[55]** be correct?
A. That's correct.
Q. Do you think it might be of significance to provide in your report that there were eleven tapes generated and that you destroyed everything but fifty-seven seconds? And I'm not bantering words with destruction. The evidence doesn't exist anymore. And all that's left is fifty-seven seconds from eleven tapes?
A. Well, it didn't seem important at the time, and it hasn't—in other cases it hasn't been a significant—if there wasn't any evidence on the tape that showed somebody was there, I didn't keep it.
Q. Do you agree—and you've had a lot of experience as a police officer—that the absence of evidence is evidence for a defendant?
A. I guess in some cases it would be.

Q. And if you were accused of being a marijuana cultivator and working a field and tending to a patch, the absence of you being documented in video tape over a period of four months, save but one time for fifty-seven seconds, might be of evidentiary value to you as a defendant; mighten it?

A. It depends upon the time of the year and the maturity of the plants.

Q. Well, let's say August the 24th through December the **[56]** 6th, might it be of evidentially value to the defendant accused?

A. I don't think so.

Q. And you make that decision all by yourself, don't you?

A. Well, with my training and experience.

Q. Now, you said in this same page 3, "The surveillance system did not record the harvesting due to a malfunction, but indications were that the harvest occurred between 12-1 and 12-4.

"The method of harvest was consistent, as compared with the harvest that took place on 11-3."

A. Yes.

Q. Would you agree with me that the video tape on 11-3 shows a subject walk into the field, cut down two plants near the ground, lay them aside, pick up something from the ground and throw it, and that's it?

A. The something that he took from the ground was the root ball from each plant. He examined the root ball and then tossed it to one side.

Q. And where do you see that on the video, that it's the root ball?

A. Where do you see it?

Q. Uh-huh.

A. It's on the video.

[57]

Q. And where does the picture of the root ball visually exist, or is that an assumption you made from your years of training that when you—

A. He pulls it out of the ground and he holds it in front of him and looks at it.

Q. Does the video show him reach down and pull it out of the ground? You can't see his hand when it's at a ground level; can you?

A. No.

Q. So you don't know whether he was pulling something from the ground or picking up something that already existed; do you?

A. No, it appears to me like he pulled it out of the ground and held it, looked at the root ball, and tossed it to one side. He does it twice.

Q. But you did not see his hand at the ground.

A. No.

Q. So again you've made an assumption, and we rely on your expertise to determine what he was doing.

A. That's correct.

Q. That tape does not show him stripping any stalks from their plants; does it? It doesn't show him stripping any leaves at all; does it?

A. No.

[58]

Q. And it doesn't show him cutting the top out of a plant four feet up and leave the stalk; does it?

A. No.

Q. And the December pictures show both of those things, don't they?

a. Yes.

Q. And the November tape never shows him walk away with anything; does it?

A. No. The tape stops prior to him leaving the patch.

Q. But your report says, and your affidavit for Search Warrant said, and I would direct your attention to Number 12 in your Affidavit for Search Warrant. You say that the video tape reveals him doing these activities and then walking off that area toward other marijuana growing with the pruners in his hand?
A. That's correct.
Q. But it doesn't show that; does it?
A. Yeah, it shows him walking in that direction before the tape goes off.
Q. It's your testimony today under oath that that video tape shows him walking off that patch?
A. Not the patch.
Q. Doesn't the video stop with him standing there facing the camera area?
A. I think the video tape—I would have to review it **[59]** again—but I think the video tape shows him turned in the direction that he was walking, and then it goes off.
Q. Well, if you have an opportunity, and if the Court—if this continues on, I want you to review that tape, because from my observation of that tape it stops with him standing there facing the ground. And you're now saying now it shows him walking away?
A. I'm pretty sure it shows him turned in that direction.
Q. But your affidavit says that he was walking toward other marijuana growing and that's the last thing seen; doesn't it?
A. There's other marijuana growing in that direction
Q. No, I'm trying real hard not to play word games with you. But it doesn't ever show him walking toward any other marijuana. There's no visual evidence of that; is there?
A. I'm going to have to look at the tape again and see.
Q. Don't you think you should know that tape by now, a year down the road when you're standing here getting ready to

go to a jury trial and my client has already pled guilty? Is it fair to expect you to know that fifty-seven seconds?

A. It's fair.

MS. BICKLE: May I have a moment, Your Honor?

[60] THE COURT: Yes.

(PAUSE)

Q. Let me ask you about the December the 6th photographs that you say you provided to Mr. Fries a week ago Sunday.

Did you have to go back and retrieve photographs and make additional copies to provide to Mr. Fries a week ago?

A. No. I gave him the copy I had.

Q. Are there any other copies existing in your office?

A. I have negatives, but I don't have any other copies.

Q. And do you always typically maintain a copy for your file?

A. Yes.

Q. So the fact that there was just one copy of the photographs existing in your file, does that suggest to you that you have previously submitted those photographs to the U. S. Attorney's Office?

A. I thought I did.

Q. Do you have any reason why you would not have submitted them to the U. S. Attorney's when you submitted the entire file?

A. I have no reason.

Q. Has Mr. Fries, or any other agent of the Government from the U. S. Attorney's Office, been to your office to **[61]** review your evidence?

A. No.

Q. Have you ever discussed the photographic evidence with anyone in the U. S. Attorney's Office?

A. We went over photographs, yes.

Q. Were there, in your memory, discussions of the December 6th, 1999 photographs?
A. We didn't discuss them till that Sunday.
Q. And what triggered that Sunday for those photographs to come up?
A. I was looking at the photographs that were going to be exhibited, and I asked about the photographs I took on 12-6.
Q. And where were you when this occurred?
A. We were—I think we were here.
Q. In Muskogee?
A. I believe so.
Q. So you realized that those photographs were missing from the photographs that were going to be submitted?
A. Yes.
Q. And what occurred next?
A. I retrieved the photographs.
Q. From where?
A. From my file.
Q. So they were on your person at that time?
[62]
A. They were down in the larger file in the car. I went and got them.
Q. So on Sunday, December the 3rd, you were here in Muskogee with those photographs—
A. Yes.
Q. —is that correct?
A. Yes.
Q. Were you aware that Ms. Cindy Brantley was going to enter a change of plea on Monday, December the 4th?
A. No, I was not.
Q. Was there any discussion between you and the U. S. Attorney's Office about contacting myself, the counsel for Ms. Cindy Brantley, or Donn Baker, on that day and making us aware of those photographs?

A. No.
Q. On Monday, December 4th, 1999, given the fact that you were aware there was some interest in the December visual evidence of the field, is there any reason why you didn't tell Mr. Baker that just the day before you became aware that the U. S. Attorney's didn't have December 6th photographs?
A. No.
Q. Would it be fair to say that since you had just had that conversation about twenty-four hours earlier, that that should have been available from your memory, to **[63]** realize that those photographs had not been submitted to the defendants?
A. Mr. Baker left in kind of a hurry. I didn't have time. He said, "That's all I want. I've seen enough," so he left.
Q. So it's your testimony today that it's Mr. Baker's fault, that if he would have stayed a little bit longer you would have told him?
A. I might have, if I could have remembered. I don't know.
Q. Well, is there anything else, sitting here today on December the 11th that you might want to remember before anybody else goes any further in this case?
A. I don't think so.
Q. Do you typically fail to reveal information on cases for up to twelve months?
A. No.
Q. So this is just a one isolated incident that this has occurred to you?
A. I guess it is.
Q. Did you take photographs of every time you went back to the field, still photos?
A. I don't think so, no.
Q. Well, I want you to try to remember as best you can whether you did or you did not?

[64]

A. My report states that photographs—it states, "From 8-24 of '99 through 12-6-99, Rose, Ryan and Alford and U.S. Forest Service LEO John Ray returned to the site to check for activity, and each time resetting the surveillance system."

"Photographs being taken at various times of the growing plants by Ryan."

So they weren't taken every time.

Q. Is there any reason why there are no photographs that are generated with the November the 8th, 2000? Given the fact that your report indicates that's the day you returned to the field, realized visually harvesting or partial harvesting had occurred, and found the video tape from 11-3? Would you agree that that would be a significant date to memorialize, as far as the evidence exists in this case?

A. I thought that I had taken photographs, but it's possible that I didn't. Sometimes when you get out there you forget to bring a camera or a battery was bad or something, you forgot film or something, but—

Q. Do you carry extra film in your car?

A. I carry extra film in my car, but I did not have my car.

Q. Whose car were you in?

A. We were in a different vehicle for drop off **[65]** purposes.

Q. Well, let me ask you this. Do you have any independent memory today of the reason why you did not take photographs, still photographs, on November the 8th, given the significance of the evidence on that day?

A. If I didn't take them, no, I don't have any reason.

Q. And if we don't have any photographs that show that date, would it be fair to say that you didn't take them, or do we have to worry about them existing out there somewhere?

A. If you don't have them, it would be fair to say that I didn't take them that day.

Q. Well, about eight days ago it would have been fair to say that no photographs existed from December 6th, if we take that explanation; isn't that correct?

A. That's fair.

Q. Why did you describe in your report the lack of video from December as a malfunction?

Let me ask you this.

Strike that.

What does the word "malfunction" mean to you in its every day, ordinary sense?

A. That it didn't work like it was supposed to.

B. Q. That it's broke; it doesn't work?

A. Not necessarily broke. Something made it—it just **[66]** didn't function like we had planned for it to function.

Q. Let me ask you this. Was there video tape, if you remember, from December that showed the same type of evidence these December the 6th photographs depict of these stalks that have been stripped?

A. I had noticed on the video tape, I do remember that, that the stalks had been.

Q. And what date was that video?

A. It started, I think, as I noted in my report, sometime between 12-1 and 12-4.

Q. Well, now, your video machine, doesn't it record the date and time? I think you told us that earlier.

A. Yes.

Q. Then why can't you tell us the day exactly when it changed.

There should have been—I guess what's the last day you saw marijuana on the stalks and when is the next day that you didn't?

A. Since it doesn't go off every day, I can't tell you the exact day that the video tape showed that it was removed. I don't know. I can't remember.

Q. Does your report dated January 5th, 2000, that we received as discovery in this case, does it reflect the last day of a video tape that reflected marijuana leaves on the stalks?

[67]

A. No.

Q. And does it reflect when was the first date that a video captured the absence of leaves on a stalk?

A. No. It has a bracket that doesn't state the date specifically.

Q. Wouldn't it have been a better policy to have documented those specific dates so that the defendants could have been aware of exactly when in time this would have occurred?

A. If I was able to determine that exactly, yes.

Q. Well, you can determine the last video you have that has a date and time stamp with leaves on a stalk; can't you?

A. Yes.

Q. And you can determine from a video tape the date and time of the first time there is a video indicating the absence of leaves from the stalk; can't you?

A. That's right.

Q. And you could have put that information in your report; couldn't you?

A. That's right.

Q. And would you agree with me that from the defendant's standpoint, Cindy Brantley and Ricky Brantley, that that might have evidentiary value? For example, an alibi defense. If they were Alaska ice **[68]** fishing on those days and they can prove it, they couldn't be the harvesters, then; could they?

A. I bracketed the dates from the 1st to the 4th.

Q. I didn't ask you how you bracketed the dates. We're talking about what you could have done, what you had the capacity to do.

A. It depends upon if there was a time period in between when there was green leaves depicted and when there was no leaves depicted, if there was a time period in there of a day or two when there no video taken, it could have happened during those days.
Q. Well, then you could have documented that fact in this report; correct?
A. The way I documented was that it occurred sometime between 12-1 and 12-4.
Q. And it would be fair to say that you don't have any evidence whatsoever of my client, Cindy Brantley, or the other defendant, Ricky Brantley, carrying any marijuana stalk from that field?
A. That's correct.
Q. You don't have any evidence on your video tapes of them putting any marijuana stalks, leaves, buds, into any container system?
A. That's correct.
Q. You merely have the fifty-seven seconds of two **[69]** plants cut down near the ground and laid on the ground; is that correct?
A. That's correct.
Q. From your recollection was there any additional we can see visual evidence of harvesting that was evidenced in your visual observation on November the 8th, in addition to the two plants that we can see visual evidence of?
A. Yes.
Q. How many?
A. I didn't count them.
Q. And is there some reason why you didn't provide that information in your report as to what the additional evidence suggested about the extent of the partial harvest?
A. No particular reason.
Q. No particular reason?

A. No.
Q. Do you think that might be of some potential interest to the defendant?
A. I don't know. It might be.
Q. Would you agree with me that you're not the defendant, and it's best to let the Court and everybody else decide what is evidentiary valuable rather than you? Would you agree?
A. When you're out in the field you have to make a **[70]** determination on what you're going to do. And you can't obviously—there's always something that somebody is going to want somewhere down the line that you didn't do. And you just have to make that judgment call out there, how much—how much sign you want to leave, how much evidence you want to collect. And you just have to make that call in the field. And that's the call I made.
Q. Would you have left sign and alerted whoever the grower was by simply putting in your report what your visual observations documented on November the 8th, 1999?
A. No.
Q. But you didn't do that?
A. That's correct.
Q. It's pretty simple when you get to pick and choose what goes in the report to prosecute somebody; doesn't it?
A. Nothing is simple, no.
Q. Well, it's not simple for us. But would you agree that you've made individual decisions all by yourself, and you have decided what will and will not be available of evidentiary value for Ricky Brantley?
A. I guess you're correct.
Q. And for Cindy Brantley?

[71]

A. Cindy Brantley was not depicted on the video tape. I didn't charge her with cultivation of marijuana.

Q. In fact, she wasn't charged at all initially; was she?
A. Now, that's something you'll have to ask the prosecutor. I don't know how that went.
Q. Did you submit a report—let's get it to real simply—did you ever submit a report or request for prosecution to the U. S. Attorney's Office on Cindy Brantley?
A. No.
Q. Do you know if any agent for the U. S. Forestry Service ever submitted a report requesting prosecution for Cindy Brantley?
A. Not that I'm aware of.
Q. From your discussions in working in this case for the past twelve months, are you acquainted with the fact that Ms. Brantley was not indicted until she refused to, in the eye of the prosecutor, to give information as to location of proceeds from the sale of her home?
A. No, I'm not. I don't know.
Q. Have you had any discussions with the U. S. Attorney's Office concerning why Cindy Brantley was indicted?
A. She was indicted because she was at the residence **[72]** where these firearms were at and the marijuana was at.
Q. And that's your understanding?
A. Yes.
Q. Did you try to interview Cindy Brantley during the search?
A. Yes, I did talk to Cindy Brantley.
Q. Did you advise her of her Miranda Warnings?
A. No.
Q. You didn't consider her a suspect; did you?
A. Not at that time, no.
Q. Even though all of this stuff that she was indicted with, these nineteen guns, you saw them that day; didn't you?
A. Yes.

Q. But you made a decision, like all these other decisions that you make in the field to determine what is and is not if evidentiary value to a person, to not select Ms. Cindy Brantley as a defendant or a suspect; isn't that correct?

A. Yes.

Q. So apparently, at that time, you didn't find the evidence significant enough with connection to Ms. Cindy Brantley to even list her as a request for prosecution suspect?

A. No.

[73]

Q. Is it your testimony that all the plants in the marijuana patch are apparently or approximately the same age?

A. Approximately.

Q. Did you ever see any visual evidence of new growth or new planting?

A. New growth on the existing plants?

Q. No, new growth from an initial plant breaking the ground.

A. No, I didn't see any new plants coming up. No.

Q. Do you have any visual evidence of any kind or any other evidence, that Cindy Brantley planted any marijuana, or that Ricky Brantley planted any marijuana?

A. No.

Q. Do you have any evidence that either of these defendants ever went to that field and watered those plants?

A. No.

Q. Do you have any evidence that either of those defendants ever went to that field and fertilized those plants?

A. No.

Q. When was the surveillance system removed?

A. Twelve six.

Q. And where does it exist at this time?

[74]

A. I have several—well, I have more than several. And to tell you exactly where that system is at, I couldn't tell you. It

could be in another state; it could be in this state; it could be in Arkansas.

Q. Does it have an identifying serial number?

A. Yes.

Q. Is there some log somewhere that would identify the particular system that was utilized in this case?

A. No, there is not.

Q. So you don't document by the serial number what surveillance system is placed in which case?

A. No.

Q. So we could never go back and obtain that machine that was used in that investigation, to take it to an expert and get an independent opinion about how it operates whether it malfunctions, or any other information about that machine?

A. That's correct.

Q. Is it a difficult process to document what machine you use in what field?

A. No, it's not that difficult. There are numerous surveillances going on at one time.

Q. Well, just how many numbers are in a serial number? Eleven?

A. I don't know.

[75]

Q. It might take you less than two seconds to write it down?

A. The actual system does not have a serial number. There's a serial number on the camera, but the actual system does not have a serial number.

Q. And there's no way of identifying those particularly, or making them identifiable, like putting a number on them?

A. I guess you could, but a lot of times these systems, parts of the components will not work, and you have to replace with different components, so they're kind of mixed, you know, at different times of the year.

Q. How were you counting plants? Was that by individual root systems in the ground?

A. We count the actual—as the stalk comes out of the ground, you know, try to count each individual stalk as it comes out of the ground.

Q. So it's going to be your testimony today that on August the 24th you got down in that field in a position where you could see the individual root systems coming out of the ground and counted fifty-three plants?

A. Well, you won't see the root systems.

Q. Well, the stalk—

A. Yeah, that's correct.

Q. —coming out of the ground?

[76]

A. That's correct.

Q. So you got close enough to everything that would have disturbed the field quite a bit; wouldn't it?

A. Well, you have to be careful.

Q. Well, we don't have any visual evidence you did any of that.

A. No.

Q. Do you guys have video cameras?

A. Yes, we have video cameras.

Q. Do you have the potential of going out there and just take a video camera and let somebody video you counting these individual plants?

A. Yes.

Q. Was there just you or was there more people than you that went on August 24th?

A. There was three of us.

Q. When you said there was evidence of a harvest in November, did you find any root systems, or whatever you call this thing, the balls, whatever it was? Did you find of those laying around anywhere?

A. There was two depicted on video, and I did not photograph them in place.
Q. Did you see any others, other than what you're saying is that on the video on November 3rd, did you see any other evidence of stalks laying on the ground, root [77] systems pulled up? I guess when you pull it up by the stalk it's got the roots on the end of it. Did you see anything like that?
A. I don't recall.
Q. And there's no visual evidence of what was seen of that, if it did exist?
A. No, just on the video tape.
Q. And that would be pretty good evidentiary value, wouldn't it, if there was evidence of stalks laying on the ground or root systems, or things like that, that would be pretty good evidence of harvesting; wouldn't it?
A. I guess it would be.
Q. Is there any evidence that exists with monitoring the surveillance system itself, or providing repair to the particular system that was in place?
A. No.

MS. BICKLE: Pass the witness.
THE COURT: Mr. Baker?

REDIRECT EXAMINATION

BY MR. BAKER

Q. You told Mr. Fries that you had been trained, and you went through some of your training; is that correct?
A. Yes.
Q. And the National Law Enforcement Center is where [78] part of your training was?
A. Yes.
Q. What part of that training, the course that you took, indicated that you should destroy evidence?

A. No part of training told me that.
Q. Would it be a fair statement that in all this discussion that you had about surveillance systems, nowhere in that course did they tell you that you should tape over or destroy what would be potentially as evidence for a defendant?
A. No.
Q. The best I can tell is the reason we have one tape instead of the eleven, is that it was a budget constraint?
A. Budget plays some part of it, yes.
Q. And so there's ten of them. And it's somewhere between a hundred to two hundred dollars would be the whole cost of what you saved our Government?
A. Some of those tapes could have been—in fact, some of them were reviewed in the field and used right then and there in the same system.
Q. My question is, is that we're talking about if there was eleven tapes, and you kept one, that means ten have been used again, or whatever. And you told us that it was anywhere from ten to twenty dollars per tape?

[79]

A. Yes.
Q. So by doing it the way you did it, you had saved our government somewhere between a hundred and two hundred dollars?
A. On that particular patch I guess that's what it equates to.
Q. And if I'm not mistaken, there were three federal agents that would go out there these eleven times. Each and every time there was three of you that would go out there?
A. That's not correct.
Q. How many would go?
A. Oh, there would be probably at least three, but not perhaps the same three.

Q. I didn't ask if it was the same three. The point I'm trying to make is you all weren't too concerned about the government's dollar when three of us was going out there to look at this camera. That was costing the government your time and everything at that point; wasn't it?
A. It takes that amount of officers to safely do that.
Q. Okay. You told us that you had a larger file. Your file has not be turned over; has it?
A. Yes, my file has been turned over.
Q. So everything that's in your file Mr. Fries has?
[80]
A. There might be some other—there might be something that hasn't been.
Q. What might there be that you haven't given?
A. I don't think there's anything.
Q. Well, now, I'm fixing to ask that you go get that file.
A. I have it.
Q. Okay. Now tell me, you're saying that when the Judge looks at this that everything that's in Mr. Fries—he's not going to find anything in your file that isn't in Mr. Fries?
A. I don't think so.
Q. Well—
A. I don't think so.
Q. Well, but you're not sure?
A. I haven't compared the two, no.
Q. You indicated a while ago that I left in a hurry is the reason you all maybe didn't tell me about the December photographs.
A. Yes.
Q. Did you get the impression the reason I left in a hurry was because that's just at the time that I found out that you all had destroyed, taped over, that there really was this tape, at some point there was a tape of the December?

[81]

A. That's correct.

Q. And it was obvious to you, was it not, that I was upset that I'm just now finding out that that existed?

A. That's correct.

Q. And that I had been lied to?

A. You never asked me if there was another tape.

Q. Well, from my conversations with you, Agent, was it not pretty plain to you that—I mean, did you get the impression that we were wanting your machine so I could have an expert look at it to tell me about this malfunction?

A. No, you never asked me that.

Q. So you never—Mr. Fries never said we need the deal, that it's malfunctioned, that Mr. Baker—the reason that this trial is continued and the Judge is going to give him an opportunity to check out this machine, about its malfunction?

A. No.

Q. You knew nothing about that?

A. That's correct.

You asked me how long it would take to view the tape taken on November 3rd. And I told it would take just a few minutes.

Q. Excused me just a minute.

A. And you said, "Yes, we'll do that."

[82]

Q. Okay. That's on the day that we went up there.

I'm talking about when the Court granted the continuance, were you aware that the reason for the continuance of the trial?

A. No, I was not.

Q. And you couldn't have produced that machine. I mean, you didn't know which one it was, anyway?

A. That's correct.

Q. Did he ask you if you had that system available?
A. Not that I recall.
Q. In our conversations where you indicated that malfunction was probably a bad word, you went into long deal not telling me that you had a video that you erased, you never told us that here, you told us that sometimes it doesn't trip and the sensor doesn't work. You left the impression with me when we were here, not that there was a tape, just that it didn't trip it, and so the video never ran and that's why there's no tape. Would you agree that that was the impression you were leaving?
A. No.
Q. You told Ms. Bickle that this camera doesn't give you a date, the video as its doing?
A. No, I didn't say that.
Q. So it does not only give the time, it gives the date **[83]** of—if a frog jumps in there and that's what you have, it would give us the date the frog jumped in there?
A. Oh, that's kind of an unusual thing. But, yes, it'll give you a date and time when the camera turns on.
Q. Okay. So you have destroyed the evidence that would tell us exactly the last time we could see plants with the bushes on them? You've destroyed that; haven't you?
A. I did not destroy it.
Q. You've taped over it. It doesn't exist.

I use the word "destroyed", because it doesn't exist.

A. Now, when I think of "destroy", I mean throwing it away and destroying it.

But, no, I've reused that tape, yes.

Q. Well, destroy is like if you erase it.
A. There was nobody on it, so I reused it.
Q. There was nobody on it, but it did tell us that there were plants that existed that had a bush on it. It did tell us that?
A. Yes.

Q. Okay. And that could be of evidentiary value?
A. Well, the standard I use is if there was nobody on there to depict them doing anything, then I don't keep the tape.
Q. And then we come back and we see where someone has taken all the plants off?

[84]

A. Yes.
Q. How is it that this video shows these with the bushes and then it shows them without. How is it that this doesn't get that fellow? The lady, the man, whoever it is that came in and did that, how is it that that's not on the tape? Why can't we see who that person is.

THE COURT: Get back in front of the microphone?

Q. Why can't we see who that person is?
A. Because this is a two part surveillance system.

The sensor is in a different—the camera view, field of view, is different from where the sensor—the beams of the sensor is going out. So that it's possible that the sensor, when the sensor is tripped and it sends a message to the video tape, it takes about two to three seconds for it to spool up to start recording. It is very possible that sensor was tripped and that person never then walked into the field of the view of the camera, or other things might have prevented that from being tripped at that time. It could have been a leaf that fell in front of the sensor. It would have been other things where the sensor did not operate, it didn't tell it to come on at that particular time. There's a lot of variables out there.

[85]

Q. Did you all move the video camera from place to place in the field?
A. No.

Q. So it worked good enough the day that this person was in there, the tripping device and all that, it worked that day, but it didn't work later? They didn't trip it right whenever they came and got it?
A. They were not depicted in the camera field of view.
Q. How many—let me ask you this. The only time you all counted plants was in August, is that correct, when you come up with your fifty-three number?
A. Yes.
Q. Do you know how many was in there in September?
A. Well, the actual—
Q. Do you know how many plants was located in this patch in the month of September?
A. No, I didn't count them. I didn't—
Q. Do you know how many plants was in this patch in the month of October?
A. No.
Q. Did you know how many in November?
A. No.
Q. And you didn't know how many was in December?
A. No.
Q. Would it be a fair statement, Agent, that there is a **[86]** lot of marijuana growing in—on Weyerhaeuser land in and around this area?
A. It all depends up on what you consider to be "a lot".
Q. Well, this isn't the only patch; is that correct?
A. It's not the only patch on Weyerhaeuser land?
Q. Right?
A. No, there's other patches on Weyerhaeuser land.
Q. And you tell me about how many.
A. I couldn't.
Q. Some people down there, just recently sent off to the penitentiary for growing marijuana on Weyerhaeuser land?
A. I don't know what you're referring to.

Q. Do you know of anybody that lives in close proximity to Mr. Brantley, out in that area—and that is a pretty isolated area; isn't it?

A. It's pretty isolated, yes.

Q. In that area out in there has there been other people who have recently gone to the penitentiary for growing marijuana on Weyerhaeuser land?

A. It's possible.

Q. It is not unusual for people who have cattle—

And they do get to lease Weyerhaeuser land, do they not, and run their cattle kind of open range?

A. Some people do.

[87]

Q. And these people come across these marijuana patches quite frequently; don't they?

A. No, I wouldn't say quite frequently. No.

Q. Do they come across these patches occasionally?

A. We occasionally get information from people who use the land and tell us about the marijuana patch.

Q. And you don't have any idea whether someone else came into this patch and harvested some of it or not, do you?

A. Other than Mr. Brantley, no, I don't have any evidence to show that.

Q. Well, why is it that you all say there was fifty-three plants that he harvested?

A. Well, there was fifty-three plants that we counted in August, and that was after the sexing period.

Usually when you sex the marijuana plants, you probably remove close to, I would say, fifty percent of the plants are removed from the patch at that time.

After the patch is sexed, usually the plants that are left are female plants, if you didn't miss any male plants. And that's usually what you end up with at the time of your

final harvest is what you've started with after you sexed the plants, leaving the females.

Q. So when you got there, it had already been—what did you call it?

[88]

A. Sexed. The male and female are determined well before that time.

Q. And you don't know who did that?

A. No, I don't.

MR. BAKER: I don't have any other questions.

THE COURT: Mr. Fries, any questions?

MR. FRIES: I have no further questions, Your Honor.

THE COURT: Thank you.

You can stand down.

Call your next witness.

(WITNESS WITHDRAWS)

MR. BAKER: May I have just a minute, Your Honor?

THE COURT: Yes, you may.

MR. BAKER: Your Honor, we don't have any other witnesses.

THE COURT: Any evidence from the Government?

MR. FRIES: No, Your Honor.

THE COURT: Okay. I'll start the review of all this information. Let me see you lawyers in chambers a minute.

Thank you.

(COURT RECESSED)

(AFTER RECESS)